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Supreme Court, U.S.
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No. 02-1374

In The

Supreme Court of the United States

STEVEN J. ALBRECHTSEN,

Petitioner,

v.

BOARD OF REGENTS FOR THE
UNIVERSITY OF WISCONSIN SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

When adverse employment actions occur fourteen months after protected conduct, is that legally insufficient, without more, to prove causation on a Title VII retaliation claim?

When a Title VII retaliation claim is based on alleged opposition to sex discrimination in a letter mentioning neither sex nor gender, and when the trial record discloses no awareness by the alleged retaliators that the letter opposed sex discrimination, is the evidence legally insufficient to support a jury verdict for the plaintiff on that claim?

When an appellant, under Fed.R.Civ.P. 50, contests the sufficiency of evidence underlying a verdict and the appellee presents no alternate statement of facts with appropriate record references, is the circuit court constitutionally barred from assuming the appellant's statement of facts is accurate?

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[1] Respondent, obliged to correct misstatements of fact and law in the Petition (S.Ct.R. 15.2), does so by presenting these alternate "Questions Presented" (*compare* Petition at i), articulating the relevant facts (*compare* pp. 1-15 *infra* with Petition at 5-15) and addressing the relevant legal principles (*compare* pp. 16-30 *infra* with Petition at 15-20).

LIST OF PARTIES

The caption of the Petition contains only two of the seven parties to the proceeding in the court whose judgment is sought to be reviewed, such the Petition should have contained a List of Parties. S.Ct.R. 14.1(b). The parties to that district court proceeding were:

Petitioner, Steven J. Albrechtsen,
plaintiff-appellee-cross-appellant below.

Respondent, Board of Regents of the University of Wisconsin System, defendant-appellant below.

H. Gaylon Greenhill, defendant-cross-appellee below.

David J. Prior, defendant-cross-appellee below.

Jeffrey C. Barnett, defendant-cross-appellee below.

L. Brenda Clayton, defendant-cross-appellee below.

Dianne C. Jones, defendant-cross-appellee below.

William L. Myers, defendant-cross-appellee below.

No party is a nongovernmental corporation. S.Ct.R. 14.1(b) and 29.6. Respondent is a governmental entity and the other parties are governmental employees.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF RELEVANT FACTS

Petitioner was a tenured professor in the Department of Health, Physical Education, Recreation and Coaching (HPERC) at a Board campus, the University of Wisconsin-Whitewater (UWW). (Tr. 1-99/12 to 1-100/3.)

Judgment was entered for Petitioner on verdicts finding that Respondent retaliated in March of 1998, regarding merit pay and workshops, for opposing sex discrimination prohibited by 42 U.S.C. §§ 2000e *et seq.* (Title VII). (Ap. 23a and 120a.) The alleged retaliators were L. Brenda Clayton, HPERC Chair (Clayton), Jeffrey C. Barnett, Dean of the College in which HPERC was a Department (Barnett), and H. Gaylon Greenhill, Chancellor of UWW (Greenhill). (Tr. 1-105/20 to 1-111/18.) After Respondent's posttrial motions were denied (Ap. 22a-29a), the circuit court determined, on Respondent's timely appeal, that Respondent was entitled to judgment as a matter of law under Fed.R.Civ.P. 50(a)(1) for insufficiency of evidence and reversed and remanded for entry of judgment for Respondent. (Ap. 1a-8a.)[2]

A. Time gap between protected conduct and adverse actions.

Denying Respondent's Motion in Limine, which argued that Petitioner's EEOC charge restricted him to protected conduct before July 14, 1991 (Ap. 58a-60a), the trial court allowed him to cite, as potential protected conduct, his January 10, 1997 letter to Greenhill (Ap. 32a-40a, 64a-67a) or any of his written communications in November and December 1997 and January 1998. (Ap. 23a, 54a, 67a-71a, 82a-89a.) Petitioner proposed trial exhibits included multiple copies of the January 10, 1997 letter and of his many letters and memoranda between November 1, 1997 and January 31, 1998. (Ap. 58a-63a.)

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[2]The circuit court needed to address only one of Respondent's nine contentions to grant full relief to Respondent. (Ap. 2a.) Respondent submits that the Petition should be denied. If granted, Respondent will argue for affirmance or, alternatively, for remand to address Respondent's other contentions.

The trial court derived, from Petitioner's EEOC charge, a relevant period of November 1997 to September, 1998 and, with the express exception of the January 1, 1997 letter, based exhibit admission decisions primarily on whether they fell within or outside that period of time. (Ap. 23a, 54a, 64a-67a, 67a-71a, 82a-88a.) At the final pretrial conferences, therefore, rather than deny admission to Petitioner's letters and memoranda from November 1, 1997 to January 31, 1998, the trial reserved rulings so that Petitioner could renew motions to admit those letters and memoranda as trial proceeded. (Ap. 23a, 54a, 64a-67a, 67a-71a, 82a-89a.)

Petitioner did not, before or during trial, seek admission of any letter or memorandum from November 1, 1997 through January 31, 1998 for purposes of showing that it constituted protected conduct. (Ap. 23a, 54a, 64a-67a, 67a-71a, 82a-89a, 96a-97a, 105a-106a.) The January 10, 1997 letter to Greenhill (Ap. 32a-40a) was the only document as to which Petitioner sought admission for purposes of showing that it constituted protected conduct. (Ap. 54a, 64a-67a, 80a, 96a-97a, 105a-106a.) With Petitioner and Respondent stipulating that it could be admitted for the purpose of what it stated rather than the truth of its statements, the trial court admitted that January 10, 1997 letter as Trial Ex. 11. (Ap. 104a-106a.)

Before and during trial, Petitioner identified the January 10, 1997 letter as the protected conduct on which his retaliation claims were based. Arguing for the admission of an exhibit that was not received (because it was outside the period defined by the EEOC charge), Petitioner asserted that it "was in retaliation against the January 10, 1997 complaint." (Ap. 85a.) In characterizing his proposed exhibits, Petitioner summarized the January 10, 1997 letter, unlike his November 1997 through January 1998 communications, as a "Complaint letter" (Ap. 58a-59a). His opening statement and closing argument identified the

January 10, 1997 letter as the protected conduct on which he grounded his retaliation claims. (Ap. 89a-90a and 115a-117a.) Respondent asked the jury, in its closing argument, to note both the absence of any allegations about sex discrimination in the January 10, 1997 letter and a fourteen month gap between the letter and the adverse actions. (Ap. 117a-119a.) Petitioner, in his reply closing, asked the jury to read the letter in the "context" of complaints he made before January 10, 1997. (Ap. 119a.)

Petitioner testified that he complained about sex discrimination in 1989 and 1995 and was precluded from elaborating on those complaints because they were outside the relevant period. (Ap. 90a-92a.) When his attorney asked him when, after 1995, he made "a similar complaint," Petitioner stated he could not recall. (Ap. 92a.) He responded to his attorney's next question - "Approximately then" - by stating "Probably about 1998." (Ap. 92a.) Though "1998" - if before October 1998 - was within the relevant time period on which the court allowed inquiry (Ap. 23a, 54a, 64a-67a, 67a-71a, 82a-88a), Petitioner's attorney did not seek any elaboration. (Ap. 90a-92a.) Petitioner mentioned no 1997 complaint during this first line of inquiry. (Ap. 90a-92a.)

Later, his attorney asked Petitioner whether he had "file[d] a written complaint regarding the subject of gender-based discrimination with Dr. Greenhill in 1997." (Ap. 92a.) After responding affirmatively (Ap. 92a), Petitioner stated a recollection, without looking at the January 10, 1997 letter, that it discussed discrimination "against males and against heterosexual women with whom he was associated." (Ap. 92a-96a.) He did not otherwise testify about the letter during the liability phase. (Tr. 1-117/7 to 1-190/1, 2-187/21 to 2-203/17.)

Beyond noting that the words "sex", "gender," "male" and "female" do not appear in the January 10, 1997 letter (Ap. 32a-40a), Respondent refrains from characterizing

here the contents of the January 10, 1997 letter, the entire text of which is included in the Appendix. (Ap. 32a-40a.)[3]

After trial commenced and before Petitioner rested his case-in-chief, the only exhibit on which he renewed a motion for admission was the January 11, 1997 letter (the trial court again reserved). (Ap. 96a-97a.) After resting, the trial court denied Respondent's subsequent Fed.R.Civ.P. 50 motion citing to the January 10, 1997 letter as the most recent "complaint" on which Petitioner was apparently grounding his retaliation claims. (Ap. 97a-100a.)

At Petitioner's request, and with Respondent consenting, the January 10, 1997 letter was received into evidence as Trial Ex. 11 (Ap. 32a-40a) for its statements, not their truth, to give Petitioner - as the trial court stated later - an opportunity to show that Clayton, Barnett and Greenhill, as purported retaliators, knew he had opposed sex discrimination. (Ap. 104a-106a, 129a.) After Trial Ex. 11 was admitted, Petitioner refrained from cross-examining Clayton and Barnett about the January 10, 1997 letter (Tr. 1-277/4 to 1-315/18, 2-20/13 to 2-34/13, 2-37/4 to 2-39/3, 2-58/9 to 2-80/14 2-83/16 to 2-84/25, 2-159/14 to 2-182/8, 2-185/23 to 2-187/11), but did he did cross-examine Greenhill about that letter. (Ap. 112a-115a.)

Petitioner's closing argument, characterized the January 10, 1997 letter as the culmination of his having "complained at various times about being treated unfairly" and asserted that, "by January of 1997 [he] was complaining specifically, in Exhibit 11, to Dr. Greenhill about being unfairly treated in matters of his participation in the activities of the department as a man and also being subjected to the

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[3] Respondent, sensitive to the circuit court's perception that its Statement of Facts was "tendentious" (Ap. 3a), presents the January 10, 1997 letter in its Appendix (Ap. 32a-40a), unfiltered by Respondent's representations about its contents, so that the Court may draw its own conclusions.

experience of having friends and associates…unfairly treated also." (Ap. 115a-116a.) In his final closing argument, Petitioner asked the jury to consider the January 10, 1997 letter in the "context of the well-known complaints that Dr. Albrechtsen had registered **at that point** against Dr. Clayton." (Ap. 119a, emphasis added.) Post-trial motions were argued, and resolved, based on the January 10, 1997 letter as the identified protected conduct underlying Petitioner's retaliation claims. (Ap. 121a-130a.)

The decisions resulting in the adverse actions all occurred in March 1998, fourteen months after January 10, 1997. (Ap. 48a-50a (Trial Ex. 836 regarding workshops) and 50a-52a (Trial Ex. 840 regarding merit pay); Tr. 1-160/6-20, 1-283/9 to 1-284/7, 2-48/9 to 2-53/12 (Barnett decisionmaker on merit pay), 2-56/19 to 2-57/3 (Clayton affected merit pay only through her ratings in March 1998), 2-152/25 to 2-156/12 (Greenhill decisionmaker on workshops).) All actions of Clayton, Barnett and Greenhill involving the workshops also occurred in March 1998 (Ap. 47a-50a, 52a), fourteen months after January 10, 1997. Merit pay issues first arose in December 1997 (Ap. 43a-44a) eleven months after January 10, 1997.

B. Knowledge about opposition to sex discrimination.

Clayton, Barnett and Greenhill, the purported retaliators (Tr. 1-105/15 to 1-111/18), each testified to knowing, or recalling having known, in the Spring of 1998, that Petitioner had complained about sex discrimination. (Ap. 100a and 102a (Clayton), 106a-107a (Barnett) and 109a-11a (Greenhill). During cross-examination of those witnesses, Petitioner asked no questions challenging that testimony. (Tr. 1-277/4 to 1-315/18, 2-20/13 to 2-34/13, 2-37/4 to 2-39/3, 2-58/9 to 2-80/14 2-83/16 to 2-84/25, 2-159/14 to 2-182/8, 2-185/23 to 2-187/11.) Petitioner asked Clayton and Barnett no questions about the

January 10, 1997 letter. (Tr. 1-277/4 to 1-315/18, 2-20/13 to 2-34/13, 2-37/4 to 2-39/3 (Clayton) 2-58/9 to 2-80/14, 2-83/16 to 2-84/25 (Barnett).) After having Greenhill confirm that he read the January 10, 1997 letter when received, Petitioner probed no further. (Ap. 112a-113a.) Greenhill, on redirect, testified to initiating an investigation, through which three disinterested faculty investigators found the letter meritless. (Tr. 2-183/16 to 2-185/17.) On recross, Petitioner asked Greenhill only about investigation procedures. (Ap. 114a-115a.)

C. Suspending workshops pending updated resume.

Petitioner claimed that his summer workshops were suspended in March 1998 due to retaliation. (Ap. 2a and 5a.) While he taught the workshops in prior summers, Clayton was first asked to approve those workshops, as HPERC Chair, in March 1998. (Tr. 1-129/17 to 1-131/23, 1-167/18 to 1-169/5, 1-268/3 to 1-271/10.) Clayton testified that she had not approved the workshops the prior year, when she first became Chair, because she was in Portugal when the approval was signed. (Ap. 101a-102a.) The Petition asserts that Clayton "'admitted she had personally approved the teaching of the same summer classes by Petitioner in previous years (Tr. 1-310 to 1-311)' [Circuit court appellee brief]" (Petition, p. 9), but those cited transcript pages reflect no relevant substantive evidence. (Ap. 103a-104a).

Compared with courses which pass through curriculum committee processes, workshop approval by Chairs provided critical screening, Barnett testified, because they were "closest to the discipline, they're closest to the area and therefore their signature carries a great deal of weight." (Tr. 2-96/25 to 2-99/9.) Chairs spoke for their Department when approving workshops. (Tr. 2-45/15 to 2-46/14.)

Clayton was concerned that the two workshops on which liability was ultimately based, "Wilderness Medicine"

and "Electrocardiography," were inconsistent with the non-medical mission of the campus (by contrast with the medical mission of the University of Wisconsin-Madison campus) and that she also lacked knowledge about Petitioner's qualifications to teach medically-related workshops. (Tr. 1-271/4-23.)[4] Also concerned about misplaced student expectations and possible legal liability, Clayton wanted to avoid "carelessly approving something without knowing the answers to those questions." (Tr. 1-271/4 to 1-272/9.)

On March 3, 1998, immediately after receiving and reviewing the requests to approve the workshops, she informed Barnett of her concerns. (Tr. 1-271/4 to 1-272/25.) On March 4, 1998, she wrote to Barnett, Greenhill and the UWW provost noting that she had concerns and forwarding materials about the workshops. (Tr. 1-271/4 to 1-272/25; Ap. 47a.) The same day, Barnett wrote to Greenhill and the provost describing some of Clayton's concerns and seeking "a legal opinion as to the validity of [her] concerns." (Ap. 48a; Tr. 2-42/4 to 2-43/4.) Not being "a legal expert" on who was qualified to teach "something with medicine in the title" or whether UWW should teach "Electrocardiography," Barnett thought a legal opinion was needed. (Tr. 2-42/4 to 2-43/4.) Recognizing that Clayton had, rather than denying approval, expressed concerns (Tr. 2-46/15-22), Barnett acted promptly to facilitate approval if her concerns were resolved (Tr. 2-42/4 to 2-43/4).

Contracts for the two workshops, dated March 2, 1998, signed by Greenhill and sent to Petitioner, were not returned although a contract for the third workshop was returned. (Tr. 2-109/5 to 2-111/5.) Reviewing the March 4, 1998 memos from Clayton and Barnett, Greenhill noted Clayton's concerns and Barnett's request for legal opinions.

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[4]Petitioner had no medical degree. (Tr. 1-165/16-19.)

(Tr. 2-152/19 to 2-153/18.) Responsible, as Chancellor, for preserving the health and safety of students and faculty and for assuring that the campus hewed to its mission as defined by UW System Administration, Greenhill sought opinions from John Tallman, a System Legal Counsel. (Tr. 2-153/19 to 2-155/5.) Greenhill knew, from the Board having, a "couple of years before this," transferred "all health-related programs" to another campus and from his more recent unsuccessful attempts to obtain a medically-related policy from the Board, that it actively excluded medically-related issues from the UWW mission. (Tr. 2-154/15 to 2-155/5.)

System Legal Counsel Tallman, responding to Greenhill's inquiry, confirmed that the expressed concerns regarding potential liabilities were "real" and should be reviewed to avoid liability problems. (Tr. 2-155/6-19.) Greenhill sent a memo, on March 17, 1998, to Petitioner, Barnett, Clayton and the provost, with a copy to Tallman, stating that it was "imperative" that the campus be protected from liabilities, that this required an assessment of workshop content and instructor qualifications and that this assessment could be performed, if necessary, by outside professionals. (Tr. 2-155/20 to 156/12; Ap. 49a-50a.) The memo stated that "an updated resume for Dr. Albrechtsen will be required so that an assessment of his qualifications to offer the proposed workshops can be assessed." (Ap. 49a.) Greenhill viewed receipt of Petitioner's updated resume as a prerequisite to further action and expected Petitioner, as the memo's recipient with the most interest in a prompt resolution, to fulfill that requirement "the next day." (Tr. 2-156/13 to 2-157/6.)

Though the Petition asserts that Greenhill "admitted… that Dr. Clayton had responsibility for providing an updated resume regarding Dr. Albrechtsen (Tr. 2-177)' [Circuit court appellee brief]" (Petition, p. 9), the cited transcript page instead reflects Greenhill testifying that the responsibility was on Petitioner and could be borne by no

one but Petitioner. (Ap. 111a-112a.) The Petition also asserts that Greenhill "'admitted...that...an updated resume...was already on file with Dr. Clayton as department chair' ...(Tr. 2-180)" (Petition, p. 10), but the cited transcript page does not contain any such testimony and instead reflects Greenhill testifying that Petitioner was expected to provide an updated resume. (Tr. 2-180/1-25.)

Had Petitioner promptly provided an updated resume, and had the assessment favored approval of the two workshops, Greenhill perceived no obstacles to Petitioner teaching the workshops during the 1998 Summer Session. (Tr. 2-157/7-14.) Barnett and Clayton also assumed that Petitioner was required to, and would, provide an updated resume. (Tr. 1-169/11 to 1-174/20, 1-273/13 to 1-276/5, 2-43/14 to 2-45/14; Ap. 52a.) Barnett stated why, in his view, only Petitioner could fulfill that requirement:

> [W]e do not have access to an updated resume. As the name implies, updated means up to date. And only Dr. Albrechtsen knows and can determine what is considered an updated resume. Any resume we may have found in any file would not be updated even if it was a month old. So since Dr. Albrechtsen is really the only one to determine what accomplishments he wanted to put on such a resume, he was the only one who could really provide an updated resume, which would have been to his advantage clearly because resumes can be written for a variety of purposes. ...

(Tr. 2-43/17 to 2-44/16.)

Petitioner not having provided an updated resume was the reason the assessment process was not initiated. (Tr. 1-169/11 to 1-174/20, 1-273/13 to 1-276/5, 2-43/14 to 2-45/14, 2-155/20 to 2-157/14; Ap. 49a-50a and 52a.) Had Petitioner's summer workshops been approved by mid-April

1998, two separate mailings in April 1998 would have advertised his workshops. (Tr. 2-99/23 to 2-100/16 and 2-111/6 to 2-113/6; Trial Ex. 842.) Had he promptly provided an updated resume, ample time remained to complete the assessment, approve the workshops if justified by the assessment, and include them in those special mailings. (Tr. 2-155/20 to 2-157/14, 2-99/23 to 2-100/16 and 2-111/6 to 2-113/6; Ap. 48a-50a and 52a.) Petitioner voluntarily cancelled his third workshop, "Exercise Lite," though listed in those separate mailings. (Tr. 1-179/13-19; Tr. 2-112/21 to 2/113/13.)

Petitioner stated that he was in the best position, of the four recipients of the memo, to provide his updated resume and that, for the assessment process to commence, a resume was required. (Tr. 1-170/18 to 1-171/12, 1-174/6-13). He also stated that he read the March 17, 1998 memo as requiring someone else to provide his updated resume. (Tr. 1-170/18 to 1-171/12. *See* Ap. 49a-50a.)

Barnett expressly reminded Petitioner in the fall of 1998, when he sought approval of the workshops for the following summer, that he had to provide an updated resume to start the process. (Tr. 2-43/14 to 2-45/14; Ap. 52a.) Petitioner did not provide any updated resume. (*Id.*)

D. Merit pay decisions.

Petitioner claimed he received less merit pay in 1998 in retaliation for opposing sex discrimination. (Ap. 2a and 5a.) The 1998 UWW merit pay processes were individualized by different pools, with separate merit pay amounts allocated to each pool and thereafter divided amongst those in the pool. (Tr. 1-233/10 to 1-234/7; 2-135/8 to 2-139/16.) Campus administrators, uninfluenced by Greenhill, Barnett or Clayton, decided who was in each pool and who, within each pool, evaluated entitlement to merit pay. (Tr. 1-234/8-23; 2-135/8 to 2-139/16.) The tenured faculty members of the relevant pool, Clayton, Petitioner,

Jacqueline Dailey, Constance Kirk and Karen Barak, were designated by campus administrators to evaluate merit pay within that pool, subject to Petitioner and Barak refraining from evaluating one another due to their personal relationship. (Tr. 1-234/8-23, 1-238/10 to 1-239/9.) To avoid conflicts over Clayton, as Chair, being in that pool, Bruce Bukowski handled all mechanics and details regarding merit pay calculations and Clayton's roles as Chair were confined to, as Chair, assuring that the overall process was completed properly and, as faculty member, evaluating the teaching, service and research contributions of herself and others in the pool. (Tr. 1-235/20 to 237/24.)

The 1998 merit pay process was Clayton's first as Chair. (Tr. 1-239/24 to 1-240/3.) To her, it was critical in determining faculty merit pay that student evaluations were properly conducted according to university policy designed to maintain integrity and assure meaningful results. (Tr. 1-240/4 to 1-241-17.) It was "required for merit" that faculty members have students distribute and collect evaluations, without faculty members present, and for those students to take completed evaluations to the Department office. (Tr. 1-240/4 to 1-241/20.) The Petition asserts that Greenhill "admitted that Dr. Clayton's demand that Dr. Albrechtsen handle student evaluations a certain way could not be excused or explained by a written directive from him, as Clayton had contended (Tr. 2-143 to 2-145)' [Circuit court appellee brief]." (Petition, p. 9.) The cited transcript pages instead support contrary testimony by Greenhill. (Ap. 107a-109a.)

In the fall of 1997, Clayton learned that, although Petitioner's merit pay materials cited student evaluations, the HPERC office lacked records of any student evaluations relating to him after 1991. (Tr. 1-240/4 to 1-247/10.) Concerned that Petitioner cited student evaluations that, if performed at all, were not performed properly, Clayton asked him to explain. (Tr. 1-240/4 to 1-251/14.) Receiving

no explanations, she wrote him on January 12, 1998 hoping, and anticipating, that he "would provide some information about why he hadn't submitted" student evaluations properly. (Tr. 1-252/4-20; Ap. 44a-45a.)

Because issues involving Petitioner delayed the HPERC merit pay process and, indirectly, the entire merit pay process, Clayton copied Greenhill, Barnett and the provost on that memo. (Tr. 1-253/2-20; Ap. 43a-44a.) On January 22, 1998, Clayton informed Greenhill that the HPERC generally followed required student evaluation procedures. (Tr. 1-244/6 to 1-247/245/18; Ap. 45a-46a.)

Greenhill responded, on January 26, 1998, that "university policy" on student evaluations required that "faculty members do not collect evaluations themselves but have a student deliver to the department's office" so that the "department knows that evaluations have been completed and a record of the score." (Ap. 46a-47a, underlining in original; Tr. 2-143/4 to 2-144-11.) He also stated that, because "the Board of Regents requires student evaluations for salary increases and promotions, a faculty member who does not administer student evaluations is not eligible for a salary increase" and that "[w]e have given no increase for this reason." (Ap. 46a-47a, underlining in original; Tr. 2-143/4 to 2-144-11.) He tried to underscore that following the policy was required to receive any merit pay and that, if departments certified faculty had not followed the policy, "obviously the consequences of that was no increase" for those faculty members. (Tr. 2-143/7 to 2-144/11.) Clayton understood that message. (Tr. 1-255/7-17.)

Greenhill sent Petitioner a blind copy (which Clayton first learned just before trial (Tr. 2-35/10-23)), as an invitation to contact Greenhill directly with any explanations or information. (Tr. 2-144/12 to 2-145/10. Ap. 46a-47a.) None of Petitioner's communications, between Greenhill's memo and the final merit pay decision on March 18, 1998, either diminished the conclusion that he violated policy for

several years or explained those violations. (Tr. 1-255/25 to 1-256/13, 2-145/11 to 2-146/21.) Petitioner understood, when he received Greenhill's memo, that concerns were raised over the lack of student evaluations since 1991-1992, but never explained to anyone, while this issue was pending, why no student evaluations were recorded in the HPERC office after 1991-1992. (Tr. 1-184/24 to 185/25.)

The Petition states that Barnett "'acknowledged...that he did not know of any policy allegedly violated by Dr. Albrechtsen regarding the alleged problematic student evaluations (Tr. 2-74)' [Circuit court appellee brief]." (Petition, p. 9.) That transcript page addresses workshop rather than merit pay issues. (Tr. 2-74/1-25.) Barnett testified about the policy, its importance, and to being surprised and concerned over Petitioner's inexplicable failure to follow it. (Tr. 2-51/25 to 2-52/3, 2-53/7 to 2-54/13, 2-55/17-19.) So did Greenhill. (Tr. 2-139/17 to 2-143/25.) Although Clayton could have, by certifying this policy violation, completely denied Petitioner **any** merit pay in 1998 (Tr. 2-143/16 to 2-144/11; Ap. 46a-47a), she instead reduced one of her three ratings - the "teaching" rating directly affected by the student evaluations - to "2.5" out of a possible "5," and hoped that Petitioner's self-reported (and apparently self-collected) student evaluations were substantively accurate. (Tr. 1-261/18 to 1-262/6.) Petitioner rated himself in teaching with "4.5." (Tr. 3-75/12-21.) Clayton refrained from discussing the student evaluation issue, or any other merit pay issue, with Dailey and Kirk, the other two faculty who evaluated Petitioner, because she had "no reason to discuss it." (Tr. 1-262/17 to 1-263/9.)

The dollar differential between the highest merit pay in Petitioner's pool and the amount he received was $86. (Tr. 1-302/8 to 1-303/22, 3-75/12-21.) Petitioner's complaint - that Clayton rated him 2.5 rather than 4.5 in teaching, one of three categories in the formula in which ratings by others were included - affected some fraction of $86. (Tr. 1-302/8

to 1-303/22, 3-75/12-21.) Had Clayton certified Petitioner's policy violation, he would not have received the merit pay he did receive, namely, $686 in 1998 and $686 in 1999. (Tr. 2-143/7 to 2-144/11.)

E. Greenhill and Barnett as decisionmakers.

The January 10, 1997 letter did not mention Greenhill and expressed only disappointment with Barnett. (Ap. 32a-40a.) Greenhill responded to the letter by promptly appointing three prominent faculty members to investigate. (Tr. 2-164/18 to 2-166/2, 2-183/16 to 2-185/7.) Petitioner, did not probe the mental reactions of Greenhill and Barnett to the letter. (Tr. 2-58/9 to 2-80/14, 2-83/16 to 2-84/25, 2-159/13 to 2-182/8, 2-185/22 to 2-187/12.) He left unchallenged their testimony that no complaint regarding sex discrimination influenced their actions regarding merit pay and the workshops. (Tr. 2-157/15-24, 2-57/12 to 2-58/6.)

Greenhill independently decided to suspend the workshops, pending further assessment, after legal counsel verified that the expressed concerns were legitimate and should be resolved. (Tr. 2-152/25 to 2-156/12.) Greenhill's decision was grounded on how he perceived his responsibilities as Chancellor. (Tr. 2-152/25 to 2-156/12.)

Barnett independently evaluated and approved merit pay increases. (Tr. 48/18 to 53/12, 56/19 to 57/3; Ap. 50a-52a.) His memo implemented the merit pay increases received by Petitioner and others in the HPERC faculty pool. (Tr. 2-48/18 to 2-52/3, 2-56/19 to 2-57/3; Ap. 50a-52a.) Independently from Clayton, Barnett had serious concerns about Petitioner's breach of the student evaluation policy and expressed those concerns in his decision memo. (Tr. 2-51/25 to 2-53/13; Ap. 50a-52a.)

REASONS FOR DENYING THE PETITION

I. WHEN ADVERSE EMPLOYMENT ACTIONS OCCUR FOURTEEN MONTHS AFTER PROTECTED CONDUCT, THAT IS LEGALLY INSUFFICIENT, WITHOUT MORE, TO PROVE CAUSATION ON A TITLE VII RETALIATION CLAIM.

The decision from which a writ of certiorari is sought turned on the legal insufficiency of Petitioner's causation evidence on his Title VII retaliation claims due to his reliance on temporal proximity and a gap of at least fourteen months between any protected conduct by Petitioner and the adverse employment actions in March 1998. (Ap. 5a-8a.) This Court need not grant certiorari to confirm, again, that when plaintiffs, like Petitioner, rely on temporal proximity, such lengthy time gaps make causation evidence, without more, legally insufficient on Title VII retaliation claims. *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 273-74 (2001), *reh. denied*, 533 U.S. 912 (*per curiam*) (citing, with approval, circuit decisions holding a "3-month period insufficient" and a "4-month period insufficient" while stating that the twenty month gap in *Clark County* "suggests, by itself, no causality at all"). Granting certiorari to send that same message regarding a fourteen month gap would needlessly dilute this Court's resources.

No court applying *Clark County* has misunderstood its clear message that time gaps significantly less than fourteen months are, standing alone, legally insufficient to prove causation on Title VII retaliation claims. *E.g., Kimble v. Georgia Pacific Corp.*, 245 F.Supp.2d 862, 877 (M.D.La. 2002) (*Clark County* "found that a temporal proximity of three to four months insufficient to establish a causal connection between protected activity and adverse

employment action [citation omitted]"); *Hall v. Alexander*, 2002 WL 655317, *2 (M.D.Ala. March 25, 2002) (noting citation in *Clark County* to "cases in which a three-month and four-month period was insufficient"); *Spadola v. New York City Transit Authority*, 242 F.Supp.2d 284, 294 (S.D.N.Y. 2003) (same); *Henry v. City of Tallahassee*, 216 F.Supp.2d 1299, 1319 (N.D.Fla. 2002) (same); *Little v. National Broadcasting Co., Inc.*, 210 F.Supp.2d 330, 385 (S.D.N.Y. 2002) ("temporal proximity must be 'very close' [citation to *Clark County* omitted]"); *Taylor v. Procter & Gamble Dover Wipes* 184 F.Supp.2d 402, 417-18 (D.Del. 2002) (*Clark County* "made clear that, absent extremely close timing between the alleged protected activity and the adverse employment action, a plaintiff cannot rely on mere temporal proximity to establish a claim of retaliation"); *Gross v. National Broadcasting Co., Inc.*, 232 F.Supp.2d 58, 74, text and n.12 (S.D.N.Y. 2002); *Donahoo v. Ohio Dept. of Youth Services*, 237 F.Supp.2d 844, 873 (N.D.Ohio 2002).

Applying *Clark County*, courts find time gaps far shorter than fourteen months insufficient, standing alone, to prove causation. *E.g., Perez v. Norwegian-American Hosp.*, 243 F.Supp.2d 792, 801 (N.D.Ill. 2003) (6 month gap insufficient); *Gaddis v. Russell Corp.*, 242 F.Supp.2d 1123, 1146-47 (M.D.Ala. 2003) (2 month gap sufficient under circumstances but 6 month gap insufficient); *Keel v. U.S. Dept. of Air Force*, 2003 WL 1869205, *18 (M.D.Ala. March 27, 2003) (7 month gap insufficient); *Bishop v. Bell Atlantic Corp.*, 299 F.3d 53, 60 (1st Cir. 2002) (12 month gap insufficient); *Richardson v. CVS Corp.*, 207 F.Supp.2d 733, 745 (E.D.Tenn. 2001) (12 month gap insufficient). *Cf. also, e.g., Turner v. Housing Authority of Jefferson County*, 188 F.Supp.2d 1066, 1079-80 (S.D.Ill. 2002) (2 week gap sufficient) and *Church v. Maryland*, 180 F.Supp.2d 708, 745-46 (D.Md. 2002) (14 month gap insufficient), *aff'd*, 53 Fed.Appx. 673 (4th Cir. 2002) (table).

Petitioner omits mention of not just *Clark County*, but of the time gap issue - a primary factor on which the circuit court grounded its decision. (*Compare* Petition, pp. 1-20 with 5a-8a.) Contending that the circuit court must be reversed because - despite his inexplicable failure to make any factual presentation in his appellee brief to the circuit court (Ap. 3a)[5] - sufficient evidence, allegedly ignored by the circuit court, exists in the trial record to support the verdicts, he does not identify, even now, **any** record evidence that narrows the gap below fourteen months. (Petition, pp. 1-20.)

Remarkably, Petitioner, on appeal, actually sought to abandon the January 1997 letter as potential protected conduct - likely because the letter cannot, as the circuit court concluded, reasonably be read as opposing sex discrimination (Ap. 32a-40a; see Ap. 5a) - and to push back the protected conduct on which his retaliation claims were grounded to 1991, seven **years** before the adverse actions. (Ap. 6a-8a.) *Clark County* expressed skepticism about Title VII retaliation plaintiffs switching causality horses when, on appeal, the horse ridden throughout trial court proceedings becomes demonstrably defective:

> As for the right-to-sue letter: Respondent did not rely on that letter in the District Court and did not mention it in her opening brief on appeal. Her demonstration of causality all along had rested upon the connection between the transfer and the filing of her lawsuit--to which connection the letter was irrelevant. When, however, petitioner's answering brief in the Court of Appeals demonstrated conclusively the lack of causation between the filing of respondent's lawsuit and Rice's

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[5]The circuit court briefs are available on the official website (http://www.ca7.uscourts.gov/briefs.htm) by typing in any docket numbers (01-3577, 01-3791 or 01-4197) on that webpage.

> decision, respondent mentioned the letter for the first time in her reply brief,....

532 U.S. at 272-73. The circuit court, willing to entertain Petitioner's changed theory of the case on appeal, observed it still doomed his retaliation claims - particularly given favorable treatment he received during the intervening seven year period. (Ap. 6a-8a.) In that assessment, the circuit court hardly broke new ground. *Cf. e.g., Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002) (the seven year gap between protected conduct and adverse actions "undermine any causal connection between those two events" and even a five month gap between other protected conduct and those actions was, standing alone, insufficient).

Adopting the position taken by Petitioner in the circuit court actually makes it easier to determine that his retaliation claims were groundless as a matter of law. But his position falls apart merely by noting the fourteen month time gap after January 10, 1997. Before *Clark County*, the circuit court had frequently confirmed that gaps of much less than fourteen months between protected conduct and adverse actions were, standing alone, legally insufficient to prove causation on Title VII retaliation claims. *Payne v. Milwaukee County*, 146 F.3d 430 (7th Cir. 1998) affirmed a Rule 50 judgment on a Title VII retaliation claim because the protected conduct occurred "thirteen months" before the challenged actions and causation was not affirmatively proven. 146 F.3d at 434. *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 603 (7th Cir. 2001) cited Seventh Circuit decisions finding four months and six months "insufficient" for any presumption of nexus. Petitioner does not allege that the circuit court decision conflicts with any other circuit on any issue - and it certainly is not in conflict on this issue. *E.g., Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346-47 (8th Cir. 1996), *reh. en banc denied*, 79 F.3d 84, *cert. denied*, 519 U.S. 813 (1996) (one month gap, standing alone, insufficient); *Anderson v. Coors Brewing Co.*, 181 F.3d

1171, 1179 (10th Cir. 1999) (same with 3 month gap); *Raggs*, 278 F.3d at 472 (Fifth Circuit holding same with 5 month gap); *King v. Town of Hanover*, 116 F.3d 965, 968 (1st Cir. 1997) (same with 5 month gap).

The larger the gap, in fact, the less likely that retaliation was the motivating factor. *Kipp v. Missouri Highway and Transp. Com'n.*, 280 F.3d 893 (8th Cir. 2002), *reh. & reh. en banc denied*, for example, held that "the interval of **two months** between the complaint and Ms. Kipp's termination **so dilutes** any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in Ms. Kipp's favor on the matter of causal link." 280 F.3d at 897, emphasis added. Finding a four month gap too long, *Filipovic v. K & R Exp. Systems, Inc.*, 176 F.3d 390 (7th Cir. 1999) held that adverse actions must take place "on the heels of protected activity" and reiterated that a "substantial time lapse between the protected activity and the adverse employment action 'is counter-evidence of any causal connection.' [Citation omitted.]" 176 F.3d at 399.

The sole dissenting circuit court judge - who voted with all other active judges to deny Petitioner's petition for rehearing en *banc* (Ap. 31a) - tried to save Petitioner's case by stating that, although no written complaints after January 10, 1997 appeared in the record, she gleaned oral complaints that might have been made closer to March 1998 than fourteen months. (Ap. 9a-16a.) While oral complaints **could** underlie Title VII retaliation claims, Petitioner sought at trial to rely **only** on written complaints and was allowed, over Respondent's objections (Ap. 55a-58a), to cite written complaints substantially later than his EEOC charge alleged. (Ap. 23a, 54a, 67a-71a, 82a-89a.) Petitioner chose not to cite any of the many letters and memoranda he wrote from November 1997 through January 1998, i.e., within two to four months of the adverse actions, as having opposed sex discrimination - no doubt because none did. He instead

identified the January 10, 1997 letter as the alleged culmination of earlier complaints to be the protected conduct which resulted in adverse actions in March 1998 - until he shifted gears in the circuit court and focused on protected conduct that was seven years before the adverse actions.

Despite the way the case was tried, if oral complaints could have saved Petitioner's case, even the diligent dissenting judge, searching the record on her own, located nothing beyond speculation. (Ap. 9a-16a.) To perceive Greenhill, characterizing Petitioner complaining about sex discrimination as "a recent issue," as referring to the period before the adverse actions in March 1998 (Ap. 11a-12a), when he plainly used the word "recent" to distinguish, in June of 2001, his awareness of Petitioner's numerous complaints after March 1998 from the time period "**prior to** March of 1998" (Ap. 111a) is, at best, speculation. While courts resolving Rule 50 motions "should draw reasonable inferences on behalf of the non-moving party," they "must not slip into 'sheer speculation.' [Citation omitted.]" *Gibson v. Old Town Trolley Tours of Washington, D.C., Inc.*, 160 F.3d 177, 181 (4th Cir. 1998) (Title VII retaliation case).

No reasonable juror could have concluded that there was anything less than a fourteen month time gap between any protected conduct and the adverse actions, even though the trial court gave Petitioner multiple opportunities to narrow that gap. No matter how deeply the circuit court might have delved into the trial record, the result would have been the same - judgment for Respondent based on insufficient evidence to support Petitioner's Title VII retaliation claims.

The Petition may be denied simply because, contrary to the representations made by Petitioner, the decision below turned on a principle already firmly established by this Court in *Clark County*, i.e., a time gap of fourteen months between protected conduct and adverse actions precludes proof of causation based solely on temporal proximity on Title VII retaliation claims. The deeper this Court looks at the record,

however, the plainer it may become that certiorari, if granted, would be improvidently granted.

II. WHEN A TITLE VII RETALIATION CLAIM IS BASED ON ALLEGED OPPOSITION TO SEX DISCRIMINATION IN A LETTER MENTIONING NEITHER SEX NOR GENDER, AND WHEN THE TRIAL RECORD DISCLOSES NO AWARENESS BY THE ALLEGED RETALIATORS THAT THE LETTER OPPOSED SEX DISCRIMINATION, THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A JURY VERDICT FOR THE PLAINTIFF ON THAT CLAIM.

If the time gap between protected conduct and the adverse actions were only one day, the Title VII retaliation verdicts obtained by Petitioner still could not be sustained because there was no evidence that the alleged retaliators were actually aware that he had opposed sex discrimination. *E.g., Alexander v. Wisconsin Dept. of Health and Family Services*, 263 F.3d 673, 688 (7th Cir. 2001) (with Petitioner's attorney representing Mr. Alexander, Title VII retaliation claim failed, although protected conduct was only one day before suspension, absent evidence that decisionmakers were aware of the protected conduct). *Clark County*, once again, precludes any need to grant certiorari to resolve unsettled questions. 532 U.S. at 272 (no causal connection between protected conduct ten days before suspension decision when decisionmaker unaware of protected conduct when decision was made). *See, e.g., Kaplan v. City of Arlington*, 184

F.Supp.2d 553, 564 (N.D.Tex. 2002), *aff'd*, 48 Fed.Appx. 916 (5th Cir. 2002) (table) (citing *Clark County* for proposition that actual knowledge is required).

Title VII retaliation claims fail as a matter of law absent evidence that those responsible for adverse actions actually knew that the plaintiffs had engaged in protected conduct. *E.g., Maarouf v. Walker Mfg. Co., Div. of Tenneco Automotive, Inc.* 210 F.3d 750, 755-56 (7th Cir. 2000) (on summary judgment, unlike at trial, a plaintiff "need not prove by a preponderance of the evidence that [the person responsible for the adverse action] was aware of his discrimination complaint, but [the plaintiff] must at least produce evidence that would support an inference that [the person] was so aware"); *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 260 (8th Cir. 1996) (affirming summary judgment absent "evidence that the supervisors who perpetrated the alleged indignities on Barge mentioned, or were even aware of, her EEOC claim"); *Marzec v. Marsh*, 990 F.2d 393, 397 (8th Cir. 1993) (affirming summary judgment where district court found "that Franco was not even aware Marzec was taking any action in furtherance of her sex discrimination claim during the alleged period of retaliation").

Constructive knowledge is not enough; actual knowledge is required. *E.g., Hayes v. Potter*, 310 F.3d 979, 982-83 (7th Cir. 2002). Proof of actual knowledge does not, by itself, satisfy the causation element, since evidence must demonstrate that the knowledge resulted in a retaliatory motive and concrete adverse actions. *E.g., Gibson*, 160 F.3d at 182; *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) ("[p]lainly, mere knowledge on the part of an employer that an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee"). But knowledge is, unquestionably, a bare essential. *E.g., Gibson*, 160 F.3d at 182; *Williams*, 871 F.2d at 457.

Greenhill, Barnett and Clayton each testified to lack of knowledge or memory, before the March 1998 adverse actions, of Petitioner having complained about sex discrimination and Petitioner presented no evidence to the contrary during the trial. (Pp. 6-7 *supra*.) In *Clover v. Total System Services, Inc.*, 176 F.3d 1346 (11th Cir. 1999), unlike here, a Title VII retaliation plaintiff developed a comprehensive theory for why the decisionmaker must have known about the prior protected conduct and still fell woefully short. 176 F.3d at 1354-56. The *Clover* plaintiff was similar to Petitioner in having left denials of unawareness essentially untouched in the trial record - which justified Rule 50 relief for the employer. 176 F.3d at 1354-56. Petitioner could have confronted Clayton, Barnett and Greenhill with specific statements in the January 10, 1997 letter asking each of them what they understood, at the time, those statements meant. Despite the paucity of the material - which, the circuit court correctly found, had nothing to do with sex discrimination (Ap. 5a) - Petitioner could have, through leading questions, created the impression that statements in the letter could be read as opposing sex discrimination.

He instead left untouched that testimony by Clayton, Barnett and Greenhill. Why? And how could Clayton, Barnett and Greenhill read that letter and not detect that Petitioner was opposing sex discrimination? Perhaps because even Petitioner's attorney realized the letter only alleged he was "unfairly treated." (Ap. 115a-117a.) (*Compare* Ap. 90a (Petitioner, in a 1989 complaint, "worded it as bias against males in [his] department").)

To qualify as protected conduct - an alternate ground on which the circuit court based its decision (Ap. 6a) - the letter minimally had to indicate that sex discrimination prohibited by Title VII was at issue. *E.g., Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1007-08 (7th Cir. 2000) (asserting retaliation for complaining about

pregnancy discrimination, plaintiff "**has to at least say something to indicate her pregnancy is an issue**" (emphasis added)). An employee "can honestly believe she is the object of discrimination, **but if she never mentions it, a claim of retaliation is not implicated.**" *Miller*, 203 F.3d at 1007-08, emphasis added. Title VII retaliation plaintiffs "must complain of discrimination, **not about unfairness and the like.** [Citation omitted.]" *See also Magestro v. Sullivan*, 1993 WL 325571, *1 (E.D.Pa. 1993), *aff'd*, *Magestro v. Shalala*, 27 F.3d 557 (3rd Cir. 1994) ("Plaintiff's complaints of unfair treatment, which he concedes were vague and general. . . , were not enough to have informed his supervisor that he was protesting illegal employment practices" under Title VII).

The words "sex", "gender," "male" and "female" do not appear in the January 10, 1997 letter, and it was not transformed into protected conduct by sprinkling the term "hostile environment" amongst allegations of procedural violations and breaches of contractual and associational rights. (Ap. 32a-40a.) Even if not buried amongst unrelated allegations, merely asserting that a "hostile environment" exists is insufficient without articulating a specific protected status under Title VII. *Cf. Miller*, 203 F.3d at 1007-08. Reasonable laypersons could hardly apply the heightened awareness that employment law specialists might glean from "hostile environment." Regardless, the term, far from a synonym for "sex discrimination", has a substantially longer pedigree in non-sex-based settings. *E.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986) (noting prior decisional law establishing hostile environment claims based on race and national origin and **extending** those doctrines to recognize hostile environment regarding sex). *See also Brennan v. Metropolitan Opera Ass'n, Inc.*, 192 F.3d 310, 318 (2nd Cir. 1999) ("age-based hostile working environment"). *Sweeney v. West*, 149 F.3d 550, 555 (7th Cir. 1998) held that "[c]laims that an employee was

subjected to a hostile work environment are **not** limited to conduct that is sexual in nature."

If anything, the letter connoted that references to "extremely hostile discussions" and a "hostile environment" were connected to allegations of "violations of laws and procedures" and **not** to sex discrimination. (Ap. 32a-40a.) But had the letter implied that sex discrimination might be involved, that would not have sufficed. To be protected conduct, **oppositional** activity must not leave Title VII protection to mere inference or implication. *E.g., Snellgrove v. Teledyne Abbeville*, 117 F.Supp.2d 1218, 1238 (M.D.Ala. 1999). "'It is not enough'" - as in Petitioner's letter - "'for the employee merely to complain about a certain policy or certain behavior of co-workers and rely on the employer to infer that discrimination has occurred' [citation omitted]." *Snellgrove*, 117 F.Supp.2d at 1238. The circuit court correctly concluded that the January 10, 1997 letter was not, as a matter of law, protected conduct at all (Ap. 5a), which neither Petitioner nor the dissenting judge contest (Petition, pp. 1-20; Ap. 9a-16a).

Had Petitioner overcome that daunting hurdle, no record evidence showed that Clayton, Barnett or Greenhill perceived the January 10, 1997 to be protected conduct. The speculation developed by the dissenting judge (Ap. 9a-16a) hardly filled this evidentiary chasm that Petitioner left unfilled at trial. If this Court hunted the deepest recesses - a task the dissenting judge may have undertaken - it would uncover no evidence that could sustain the verdicts reversed by the circuit court. Although it would not be necessary to even reach any constitutional question about how the circuit court approached the facts, Respondent closes by noting that its approach is in harmony with the constitutional plan. If Petitioner actually read the January 10, 1997 letter as having opposed sex discrimination, it is no wonder that he reads the Court's Seventh Amendment decisional law in Rule 50 and 56 settings as supporting his position.

III. WHEN AN APPELLANT, UNDER FED.R.CIV.P. 50, CONTESTS THE SUFFICIENCY OF EVIDENCE UNDERLYING A VERDICT AND THE APPELLEE PRESENTS NO ALTERNATE STATEMENT OF FACTS, WITH APPROPRIATE RECORD REFERENCES, CIRCUIT COURTS ARE NOT CONSTITUTIONALLY BARRED FROM ASSUMING THE APPELLANT'S STATEMENT OF FACTS IS ACCURATE.

Petitioner apparently believes that the Seventh Amendment to the United States Constitution (U.S. Const., Amend. VII) requires courts, whenever evaluating under either Fed.R.Civ.P. 50 or 56 whether a reasonable jury could find for a plaintiff, to ignore the plaintiff's failure or refusal to make **any** factual presentation. He proposes that courts must exhaustively and independently search record evidence to exclude the possibility that something in the record creates a genuine material dispute - although the plaintiff has not troubled to bring any such evidence to the court's attention.

Perhaps Petitioner's position was arguable before the 1986 trilogy of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). It was not sustainable thereafter. The judicial obligation to "review all of the evidence in the record" (*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000)) is consistent with courts assuming that facts were correctly stated by Rule 50 and 56 movants when nonmovants mount no proper challenge. Carefully examining the cross-circuit treatment of this issue in light of the Court's 1986 trilogy, *L.S. Heath & Son, Inc. v. AT & T*

Information Systems, Inc., 9 F.3d 561 (7th Cir. 1993) detected no inconsistency. 9 F.3d at 566-68. *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026 (9th Cir. 2001), analyzing that issue post-*Reeves* in a Title VII retaliation context, noted *L.S. Heath* and decisions from other circuits that had applied the Court's 1986 trilogy, and also detected no inconsistency. 237 F.3d at 1027-31.

In determining, as a matter of law, whether any reasonable jury could find for the plaintiff, courts "'must resolve any factual issues of controversy in favor of the non-moving party' **only** in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990)(quoting Fed.R.Civ.P. 56), emphasis added. "When the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to 'make a showing sufficient to establish the existence of an element essential to [its] case' [quoting *Celotex Corp.*, 477 U.S. at 322]." *Nebraska v. Wyoming*, 507 U.S. 584, (1993).

Rules allowing entry of judgment, on claims triable by jury, as a matter of law must be construed with due regard not only for the rights of plaintiffs with viable claims to have them tried by juries, but also for the rights of defendants to rely on the procedures provided by Rule 50 and 56 to judgment on claims that are legally insufficient. *Celotex Corp.*, 477 U.S. at 328. *Oglesby v. Terminal Transport Co., Inc.*, 543 F.2d 1111 (5th Cir. 1976) held that "[n]o constitutional right to a [jury] trial exists when after notice and a reasonable opportunity a party fails to make the rule-required demonstration that some dispute of material fact exists which a trial could resolve." 543 F.2d at 1112-13. Applicable rules required Petitioner, if he was dissatisfied with Respondent's Statement of Facts, to present his own statement of facts "with appropriate references to the record.

(Fed.R.App.P. 28(a)(7) and (b)(4). *E.g., Johnson v. City of Fort Lauderdale, Fla.*, 126 F.3d 1372, 1373 (11th Cir. 1997).

Petitioner ignores Court decisions finding no Seventh Amendment problem in circuit courts having granted judgments as a matter of law for verdict losers. *E.g., Weisgram v. Marley Co.*, 528 U.S. 440 (2000); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967). The Seventh Amendment hardly precludes a circuit court from ordering judgment for the verdict loser based on an appellant's articulated facts when the appellee does not properly challenge that articulation. Rule 50 standards, and inquiries, mirror Rule 56 standards and inquiries. *Reeves*, 530 U.S. at 150. The circuit court applied the same standards to Respondent's Rule 50 request that it routinely applies in Rule 56 settings, i.e., when nonmovants decline to challenge movants' articulated facts, supported by record citations, those facts are deemed conceded. *E.g., Hedrich v. Bd. of Regents*, 274 F.3d 1174, 1177-78 (7th Cir. 2001) (Petitioner's attorney representing Hedrich). Proper response by nonmovants is vital in both Rule 50 and Rule 56 settings. *E.g., Zamlen v. City of Cleveland*, 906 F.2d 209, 214 (6th Cir. 1990), *reh. denied, cert. denied*, 499 U.S. 936 (1991) (Rule 50 setting); *Laitram Corp. v. Rexnord*, Inc., 939 F.2d 1533, 1539 (Fed.Cir. 1991), *reh. denied* (same).

Adopting Petitioner's position would be contrary to this Court's rulings and would leave courts "in chaos." *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 439 (7th Cir. 1999) (noting universal application of this principle). It would require circuit courts to step "outside the proper judicial role in an adversarial system" (*Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 230 (7th Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994)) and to have other "cases languish while the judges bore through dusky papers to find material that counsel should have highlighted" (*Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1327-28 (7th Cir. 1986). The Framers had no such intent.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

PEGGY A. LAUTENSCHLAGER
Attorney General

RICHARD BRILES MORIARTY*
Assistant Attorney General
State Bar #1017190

Attorneys for Respondent, Board of Regents for the University of Wisconsin System

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**Counsel of Record*

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The text of Trial Ex. 11 (a January 10, 1997 letter from Petitioner to Greenhill) states:

Friday, January 10, 1997

H. Gaylon Greenhill, Chancellor
University of Wisconsin - Whitewater
800 West Main Street
Whitewater, WI 53190-1790

Dear Chancellor Greenhill:

For many years there have been serious problems with certain members of the tenured faculty in the former Department of Health, Physical Education and Recreation, and in the new Department of Health, Physical Education, Recreation and Coaching. These members of the tenured faculty have repeatedly violated the rights of individuals, acted without regard for law and procedure, and perpetuated an extremely hostile environment in Williams Center. This letter constitutes a formal complaint under Chapter Six of the University of Wisconsin System Personnel Rules against L. Brenda Clayton, Jacqueline A. Dailey, Dianne C. Jones, Constance C. Kirk, William L. Myers and E. John Rabe. These individuals have received substantial support in their actions from Jeffrey C. Barnett and Susan L. Moss who are also identified in this complaint.

On Friday, October 14, 1994, the tenured faculty voted unanimously to reject my application for promotion to full professor based on the false claim that my application for promotion did not follow the required format published in the University Handbook. This action was reversed and I was subsequently promoted to full professor. Thus, the tenured faculty were unable to prevent my promotion to full professor, just as they were previously unable

to prevent my promotion to associate professor. The circumstances of my promotion to full professor were fully detailed in a memorandum from me to you dated October 21, 1994.

Although my property rights were not violated in this instance, there were substantial violations of my liberty rights in the rejection of my application for promotion and in the hostility directed toward me by members of the tenured faculty subsequent to my promotion to full professor. Following my promotion to full professor, you were present at a department meeting when I was subjected to public attack by members of the tenured faculty concerning the circumstances of my promotion to full professor. My promotion to full professor was a significant factor in the extremely hostile environment in Williams Center.

The settlement agreement that you and I signed on June 24, 1993, and that was subsequently signed by Attorneys Lasker and Tallman, included a commitment stating that "The parties affirm that any evaluation of Dr. Albrechtsen for promotion to the rank of full professor shall be conducted under established criteria (involving teaching, research, and service) and procedures at the department, college and university levels." Because my application for promotion to full professor was not inconsistent with the format published in the University Handbook, the action of the tenured faculty was out of order, contrary to the procedures for promotion published in the University Handbook, and a violation of the settlement agreement that you and I signed.

During the 1994-1995 academic year, Dr. Jones used the tenured faculty to terminate the employment of Nancy J. Krattiger-Ziltener and attempted to substantially change the employment of

Jane C. Sandusky. This situation involved substantial violations of law and procedure, including the misrepresentation by Dr. Jones of actions taken by the tenured faculty. Dr. Jones ultimately obtained the support of a majority of the tenured faculty to engage in a bungled cover-up of these violations of law and procedure. I warned Dr. Jones against misrepresenting the actions taken by the tenured faculty, and refused to participate in covering-up the violations of law and procedure. The result of this situation was to substantially increase the hostility directed against me by members of the tenured faculty.

Both Joy A. Kiger and Mary Anne Hedrich were considered for tenure during the 1995-1996 academic year. Dr. Kiger's review occurred on Friday, December 1, 1995, and Dr. Hedrich's review began on Monday, December 4, 1995. Dr. Kiger's review began with a brief appearance by Dr. Kiger afterwhich the tenured faculty completed her review and recommended her for reappointment and tenure. The total time required for Dr. Kiger's review was less than one hour. Dr. Hedrich's review began on the following Monday with a brief appearance by Dr. Hedrich. After Dr. Hedrich departed, Dr. Jones initiated action intended to remove me from the tenured faculty and/or to prevent my objecting to their intended violations of law and procedure relative to the tenure decision for Dr. Hedrich.

This was followed by extremely hostile discussions extending over the next two weeks, during which I was forced to defend myself for objecting to previous violations of law and procedure. Ms. Moss attended two meetings to participate in these discussions at the request of members of the tenured faculty. During the first of these two meetings, Ms.

Moss lied to the tenured faculty by misrepresenting and then misreading Wisconsin Statutes. She quickly excused herself from the meeting after I challenged her and corrected her misreading of Wisconsin Statutes. Ms. Moss was much more subdued at the second meeting that she attended. On Monday, December 18, 1995, after having failed in their efforts to remove me from the tenured faculty, a majority of the tenured faculty voted to deny reappointment and tenure to Dr. Hedrich.

In order to deny reappointment and tenure to Dr. Hedrich, it was necessary for the tenured faculty to hold her to a higher standard of performance than that which has been applied to other probationary faculty members, and to engage in massive violations of law and procedure. While Dr. Hedrich has ultimately achieved this higher standard of performance, other probationary faculty members have not, including Dr. Kiger. Yet Dr. Kiger was granted reappointment and tenure, while only two weeks later Dr. Hedrich was denied reappointment and tenure, and then denied reappointment and tenure again in February at the time of her reconsideration. Richard L. Schauer has already provided you with an extensive memorandum detailing the violations of law and procedure that occurred relative to these decisions, and I will not restate those violations at this time.

Dr. Hedrich is one of my two closest personal friends, as well as a close colleague in the Department. After meeting with the Appeals Committee in May of 1996, Dr. Dailey stated that it was impossible for her to objectively evaluate Dr. Hedrich for reappointment and tenure because of Dr. Hedrich's friendship with me. Shortly after that, Dr. Jones stated that Dr. Hedrich was entirely

deserving of reappointment and tenure, but that she was unwilling to consider the matter further because of Dr. Hedrich's friendship with me. Dr. Jones further stated that she had offered to act as a mentor for Dr. Hedrich and that Dr. Hedrich had offended her by associating with me instead. It is clear that Dr. Hedrich is being denied reappointment and tenure primarily as punishment for her close association with me.

Karen L. Barak is both my closest personal friend and closest colleague in the Department. Since August of 1995, my family has expanded to include Dr. Barak and her three children with whom I make my home. Both Dr. Barak and Bruce J. Bukowski completed their doctoral degrees during the summer of 1995. They both received their doctoral degrees from the same university, in the same department and with the same advisor. Dr. Bukowski was immediately placed on the tenure track in August of 1995. Dr. Barak had to wait an additional year and was not placed on the tenure track until August of 1996. Furthermore, Dr. Barak was placed on the tenure track over the strong objections of Drs. Clayton, Jones and Myers who had previously been successful in delaying this change, and who communicated their displeasure to other members of the tenured faculty after the change occurred.

Furthermore, an increasingly hostile environment is being created around Dr. Barak by Dr. Clayton in her capacity as department chairperson. The situation is sufficiently serious that Dr. Barak has been advised to seek legal advice and to take specific action to protect herself under Wisconsin Statutes. Furthermore, Dr. Jones also offered to act as a mentor for Dr. Barak and will no doubt be similarly

offended that Dr. Barak has associated with me instead. Dr. Barak is concerned about the impact of her association with me on her upcoming reappointment meeting, currently scheduled for January 15, 1997.

Drs. Hedrich and Barak are by no means the only individuals in Williams Center who have been victimized by members of the tenured faculty because of their associations with me. Last semester, two academic staff members informed me that actions being taken against them by Dr. Clayton were clearly being directed at me through them. The danger of associating with me is increasingly evident to faculty members and academic staff in Williams Center. The wrongful actions of members of the tenured faculty in acting against my close friends and colleagues in the Department violate the right to freedom of association protected by the first and fourteenth amendments to the United States Constitution, contrary to 42 U.S.C.. section 1983.

During meetings of the tenured faculty, I have repeatedly objected to the failure of the tenured faculty to respect the rights of individuals, and follow law and procedure in personnel matters. I objected during the 1994-1995 academic year concerning Ms. Krattiger-Ziltener and Ms. Sandusky, I objected during the 1995-1996 academic year concerning Dr. Hedrich, and I have objected to additional problems during the current academic year. My objections are too often ignored and I am subjected to personal attack, especially by Dr. Clayton, for having raised these objections.

During meetings of the tenured faculty, I often read to the tenured faculty directly from the University Handbook to substantiate my objections. At recent meetings, Dr. Clayton has used the tactic of claiming

that what I have just read is contradicted elsewhere in the University Handbook. Although she is unable to identify the specific contradiction or locate a specific reference elsewhere in the University Handbook, she insists that the alleged contradiction absolves any responsibility for abiding by what I have just read. Other members of the tenured faculty readily follow Dr. Clayton's lead in ignoring law and procedure specified in the University Handbook.

The extremely hostile environment that exists in Williams Center is contrary to the ideals expressed in the Strategic Plan for the University of Wisconsin - Whitewater. Priority 4 promises that "UW-Whitewater will foster a sense of community, a respect for diversity, and an appreciation of global perspectives." Goal 4.1 promises "A dynamic learning community that encourages individual growth and development of values, service, respect for others, sense of citizenship, and commitment to civil discourse."

Strategy 4.1.a seeks to "Foster a learning environment in which the well-being of every individual is valued, service to one another is encouraged, freedom of expression is not compromised, and civility is affirmed." Strategy 4.1.c seeks to "Develop swift, sensitive, and appropriate responses to public acts of disrespect or discrimination toward any member of the University community." The extremely hostile environment that exists in Williams Center clearly violates Priority 4, Goal 4.1, and Strategies 4.1.a and 4.1.c of the Strategic Plan for the University of Wisconsin - Whitewater.

I had hoped that Dean Barnett might be instrumental in providing leadership to improve the climate in Williams Center and to ensure that the tenured

faculty respect the rights of individuals, and follow law and procedure in the future. In October of 1996, Jerome W. Witherill met with Dean Barnett to discuss Dr. Hedrich's situation and the climate that exists in Williams Center. I was extremely disappointed to learn of Dean Barnett's unwillingness to have any involvement in these matters.

Dean Barnett cannot escape his responsibility for the violations of rights, law and procedure perpetrated by members of the tenured faculty, or for the extremely hostile environment that members of the tenured faculty are perpetuating in Williams Center. Attorney Lasker has identified the responsibility of administrators in these matters, stating that they "knew, or should have known, and had reason to know" of violations of the rights of individuals "contrary to 42 U.S.C. section 1983." Such a responsibility applies not only to the Dean, but also to other administrators, including the Provost and the Chancellor.

I formally request that you take swift and decisive action to resolve the serious problems that I have identified in this complaint. In addition to providing necessary accountability, such a resolution requires that current problems be corrected, that adequate compensation be provided, and that reorganization occur to prevent problems from occurring in the future.

Sincerely yours,
Steven J. Albrechtsen, Ph.D.

c: David E. Lasker
Richard L. Schauer
Jerome W. Witherill

(Trial Ex. 11.)

The text of Trial Ex. 83 (an April 25, 1997 letter from Greenhill to Petitioner and an enclosed April 24, 1997 report to Greenhill from an investigative team) states:

April 25, 1997

Dr. Steven Albrechtsen
908 Kingslynn Road
Stoughton, WI 53589

Dear Dr. Albrechtsen:

In a letter dated January 10, 1997, you filed a complaint under Section 6.01, *Wisconsin Administrative Code*, against Dr. Brenda Clayton, Dr. Jacqueline Dailey, Dr. Dianne Jones, Dr. Constance Kirk, Dr. William Myers, and Dr. John Rabe.

Given the seriousness of the allegations raised in your complaint, I constituted an Investigation Team of three senior faculty members with stellar credentials and wide experience in governance issues. The Investigation Team consisted of Professor John Kozlowicz (Political Science), Professor Richard Haven (Communication), and Professor Karl Fraedrich (Accounting). Dr. Kozlowicz was designated as the Chair of the Team. The Investigation Team conducted a careful and thorough investigation of each of the allegations raised in your complaint and held two hearings. The first with you and Richard Schauer and the second with the tenured faculty members cited in your complaint.

Based on their investigation, the Investigation Team reached two conclusions:

"1. We do not believe that the tenured faculty nor the department chair in the Department of Health, Physical Education, Recreation, and Coaching has

consciously violated the university, college, or department rules for the purpose of distorting or manipulating the decision-making process."

"2. We do not believe the tenured faculty nor the department chair in the Department of Health, Physical Education, Recreation, and Coaching has acted with the intent of prohibiting Dr. Albrechtsen from performing his university, college or department functions."

The Investigation Team concluded: "Therefore, our recommendation is that no further action be taken on the allegations contained in Dr. Steven Albrechtsen's complaint of January 10, 1997."

As Chancellor, I accept the conclusions and recommendation of the Investigation Team as stated in their April 24, 1997 report. Your complaint of January 10, 1997 against Dr. Brenda Clayton, Dr. Jacqueline Dailey, Dr. Dianne Jones, Dr. Constance Kirk, Dr. William Myers, and Dr. John Rabe is dismissed.

A copy of the Report of the Investigation Team is enclosed.

Sincerely yours,
H. Gaylon Greenhill
Chancellor

Enclosure:

cc: Dr. John F. Kozlowicz
Dr. Richard Haven
Dr. Karl E. Fraedrich
Dr. Brenda Clayton
Dr. Jacqueline Dailey
Dr. Dianne Jones
Dr. Constance Kirk
Dr. William Myers
Dr. John Rabe
Dean Jeffrey Barnett

Dr. Susan Moss
Provost Schallenkamp

April 24, 1997

H. Gaylon Greenhill, Chancellor
University of Wisconsin-Whitewater
800 West Main Street
Whitewater, WI 53190

Dear Chancellor Greenhill:

The Investigation Team of Dr. Karl Fraedrich, Dr. Richard Haven, and Dr. John Kozlowicz have read, examined, and investigated the complaint from Dr. Steven Albrechtsen dated January 10, 1997. Although Dean Jeffrey Barnett and Dr. Susan Moss were mentioned in the report, the Investigation Team eliminated from them consideration since they hold full time administrative assignments.

The Investigation Team held two hearings of one hour each with Dr. Steven Albrechtsen and Mr. Richard Schauer. They offered verbal explanations of the complaint and of the companion documents that they submitted but no relevant evidence beyond the testimony of Dr. Albrechtsen and Mr. Schauer. These meetings were held on March 12, 1997 and March 18, 1997.

The Investigation Team met with Dr. Brenda Clayton, Dr. Jacqueline Dailey, Dr. Dianne Jones, Dr. Constance Kirk, Dr. William Myers, Dr. John Rabe, and Dean Jeffrey Barnett on April 3, 1997. They denied all charges in the complaint and offered testimony that contradicted Dr. Ahbrechtsen.

Based upon our investigation as detailed in this letter, we reached the following conclusions:

1. We do not believe the tenured faculty nor the department chair in the Department of Heath, Physical Education, Recreation, and

Coaching has consciously violated the university, college, or department rules for the purpose of distorting or manipulating the decision-making process.

2. We do not believe the tenured faculty nor the department chair in the Department of Heath, Physical Education, Recreation, and Coaching has acted with the intent of prohibiting Dr. Albrechtsen from performing his university, college, or department functions.

Therefore, our recommendation is that no further actions be taken on the allegations contained in Dr. Steven Albrechtsen's complaint of January 10, 1997.

Respectfully submitted,
John F. Kozlowicz,
Investigation Team Chair
Karl E. Fraedrich,
Investigation Team Member
Richard P. Haven,
Investigation Team Member

(Trial Ex. 83.)

The text of pages one and seven of Trial Ex. 825 (a January 12, 1998 memorandum from Clayton to Barnett, Provost Larry Davis and Greenhill and an attachment to that memorandum), states:

TO: Dean Jeff Barnett
Provost Larry Davis
Chancellor Gaylon Greenhill
FROM: Dr. L. Brenda Clayton
Chair, HPRC Department
DATE: January 12, 1998
RE: Delays in the Merit Review Process in the HPRC Department

The purpose of this memo is to make you aware of the latest procedural delay in the HPRC Department. In memos to Chair Clayton, dated December 1, 1997 and December 8, 1997 (not enclosed, but available if you want them); Dr. Albrechtsen raised a number of "concerns" about procedures.

I am sending you my responses to those memos (dated January 8, 1998) to document my attempt to involve Dr. Albrechtsen in the HPRC Department process of finding resolutions to those procedural questions.

In a separate memo (dated January 12, 1998 [page seven of Trial Ex. 825 quoted below]) I have put in writing, to Dr. Albrechtsen, the problem raised by his Merit Report in which he listed Student Evaluations. The fact that there are no student evaluations on file for him in the HPRC Department Files was documented in the 1996-97 Faculty and Academic Staff reviews during and in conversations with Dean Barnett and Chancellor Greenhill in the Spring of 1997.

Please provide the HPRC Department with advice about how to proceed with Dr. Albrechtsen's Merit Materials in view of the problem associated with his report of Student Evaluations and the University Rules Guiding the collection of that data.

Thank you for attention. If you would like additional information please contact me.

cc. Dr. Bruce Bukowski

TO: Dr. Steven J. Albrechtsen
FROM: Dr. L. Brenda Clayton,
Chair HPRC Department
DATE: January. 12, 1998
RE: Concerns related to the your Merit Evaluation report for 1997

In your Merit Evaluation report submitted for the two-year cycle ending in 1997, you submitted

Student Evaluations. I am most concerned about this since there are no students evaluations documented for you in the HPRC Department files since 1991-92.

As you know, this information was included in a report to the tenured faculty during faculty and academic staff reviews for 1996-97. In the process of documenting the average performance for the department on student evaluation, I had the secretary compile a report of students evaluation scores for all department members for the previous five year period. Student evaluation data sheets from the computer center were in the HPRC Department files for all faculty and academic staff except you.

I am forwarding a copy of this memo to the administration to ask for advice.

cc: Dr. Bruce Bukowski
Dean Barnett
Provost Davis
Chancellor Greenhill

(Trial Ex. 825, pp. 1 and 7.)

The text of Trial Ex. 828 (a January 22, 1998 memorandum from Clayton to Greenhill) states:

MEMO

TO: Gaylon Greenhill, Chancellor
FROM: Brenda Clayton, Chair
Department of Health, Physical Education, Recreation & Coaching
DATE: January 22, 1998
RE: Response to your Dated January 15, 1998 Related to Student evaluations

The Department of Health, Physical Education, Recreation and Coaching does conduct student

evaluations that comply with the guidelines that you described in you memo dated January 15, 1998.
I have enclosed documents where this has been made a matter of record.
cc
Dean Jeff Barnett
Provost Larry Davis

(Trial Ex. 828.)

The text of Trial Ex. 827 (a January 26, 1998 memorandum from Greenhill to Clayton revised on January 29, 1998) states:

MEMORANDUM
REVISED 1/29/98

TO: Dr. L. Brenda Clayton, Chair
Department of Health, Physical Education, Recreation & Coaching
FROM: Chancellor H. Gaylon Greenhill
DATE: January 26, 1998
RE: Student Evaluations of Teaching

I am delighted to see that the Department of HPERC follows university policy with regard to administering teaching evaluations. Absolutely, key is that faculty members do not collect evaluations themselves but have a student deliver to the department secretary's office. This way the department knows that evaluations have been administered and has a record of the score. Only after this is completed are they returned to the faculty.

As the Board of Regents requires student evaluations for salary increases and promotions, a faculty member who does not administer student evaluations is not eligible for a salary increase. We have given no increase for this reason.

HGG:rg
cc: Interim Provost Davis
Dean Barnett
bcc: Dr. Steven Albrechtsen

(Trial Ex. 827.)

The text of Trial Ex. 838 (a March 4, 1998 memorandum from Clayton to Barnett, Provost Larry Davis and Greenhill) states:

TO: Dean Jeff Barnett
Provost Larry Davis
Chancellor Gaylon Greenhill
FROM: Dr. L. Brenda Clayton
Chair, HPRC Department
DATE: March 4, 1998
RE: Workshops previously approved for Dr. Steven Albrechtsen
Several workshop forms, which have previously been approved, were recently returned for my signature. In reviewing the workshops for the Chair's Signature, a number of concerns were raised. I would like to discuss these concerns with you immediately.
Please let me know how soon a meeting can take place.
Thank you for your assistance.
Enclosures

(Trial Ex. 838.)

The text of the first page of Trial Ex. 837 (a March 4, 1998 memorandum from Barnett to Provost Larry Davis and Greenhill) states:

MEMORANDUM

TO: Chancellor Greenhill
Interim Provost Davis

FROM: Jeffrey C. Barnett, Dean
College of Education

DATE: March 4, 1998

RE: Workshop Proposal Concerns

Attached is a memorandum from Brenda Clayton in which she expressed her concern about two course proposals that were generated by Steve Albrechtsen. Brenda and I met on 3/3/98 to discuss her concerns. It is my understanding that she is questioning Steve Albrechtsen's credentials to teach these two workshops. In particular, she is questioning whether Steve can teach a course with "medicine" in the title and content that might legally be restricted to persons with a medical degree. For example, she has stated that to the best of her knowledge, Steve is not even certified in First Aid, yet the "Wilderness Medicine" course discusses topics that are "beyond first aid." She has similar concerns about the legality of Steve teaching a workshop in "Electrocardiography" without the appropriate medical degree and training.

I am requesting from you a legal opinion as to the validity of Dr. Clayton's concerns.

cc: Dr. Brenda Clayton

(Trial Ex. 837, p.1.)

The text of Trial Ex. 836 (a March 17, 1998 memorandum from Greenhill to Provost Larry Davis, Barnett, Clayton and Petitioner) states:

MEMORANDUM

TO: Larry Davis, Interim Provost and Vice Chancellor for Academic Affairs
Jeff Barnett, Dean, College of Education
L. Brenda Clayton, Chair, Department of HPERC
Steven Albrechtsen, Professor, HPERC
FROM: Chancellor H. Gaylon Greenhill
DATE: March 17,1998
RE: Workshops

As it is imperative that the university be protected from liabilities that might arise from the offering of the proposed "Wilderness Medicine" and "Electrocardiography" Workshops, we must see that due diligence has occurred before either are scheduled to be offered. This diligence requires an assessment of the content of the workshop to determine if it is appropriate to our university mission and an assessment of the qualification of the instructor to deliver such a course.

If such expertise is not available on our campus, a team of three professionals outside our university should be constituted to make the needed assessments. In addition to the proposed workshop outlines, an updated resume for Dr. Albrechtsen will be required so that an assessment of his qualifications to offer the proposed workshops can be assessed.

Until such assessments can be made, the proposed Wilderness and Electrocardiography Workshops are not authorized for offering.

I will await your recommendations of potential persons qualified to assess the content and evaluate the qualifications of Dr. Albrechtsen to teach these workshops. I will await the department's justification why such workshops are appropriate or necessary to the physical education program given

the lack of mission in health related areas at UW-Whitewater.
HGG:mw
cc: John Tallman

(Trial Ex. 836.)

The text of the first page of Trial Ex. 818 (a March 18, 1998 memorandum from Barnett to Greenhill) states:

MEMORANDUM
TO: Chancellor Greenhill
FROM: Jeffrey C. Barnett, Dean
College of Education
DATE: March 18, 1998
RE: Merit Distribution for HPRC
Attached is the merit distribution for the Department of Health, Physical Education, Recreation and Coaching. I believe that a note of explanation is warranted. Please note that on sheet #2, Bonnie Trudell and Wanxiang Yao are our two new faculty members and they have been given an average rating. Bruce Bukowski computed this average rating by dividing 1.0 by 7 to come up with 1.428. The other faculty members were given merit per the department computations. Please note that by giving Trudell and Yao this average rating, two faculty members are below the average. If this calculation is not correct, sheet #1 contains the merit ratings of the five faculty members who have served more than one year. By copy of this memo, I am alerting Randy Marnocha to this so that if sheet #2 was not done according to the University procedures, he can recalculate it based on the data on sheet #1. Similarly, Ann Garvin and Penny Portman were given the average rating as academic staff members by

dividing 1.0 by 4. Please note that Kathleen Happel has a .64 FTE assignment, whereas the other members of the merit pool are all at 1.0 FTE.

I want to express my appreciation for the extra time to complete these merit evaluations. However, per our last discussion, please be advised that there are still some unresolved issues regarding the merit for Steve Albrechtsen. First, the department chair reports that Dr. Albrechtsen self reported his student evaluations and that the department has no record of student evaluations that were conducted in accordance with department policy. I would also point out that in your 1/13/98 memo to Dr. Clayton, you made it very clear that UW-Whitewater's guidelines for the administering of student evaluations specifies that the faculty member should designate a student to deliver those evaluations to the department chair or designee so that they can be calculated and recorded by the official department process. I, therefore, believe that it is not appropriate for Dr. Albrechtsen to self-report his student evaluations. I might also add that Dr. Davis has not accepted self reported student evaluations for any of the reappointments forwarded to him but has requested to see the actual computer printouts. A second issue is that Dr. Albrechtsen has refused to conduct peer evaluations that were assigned to him during this past year. Third, Dr. Albrechtsen has refused to participate in any of the evaluations and reappointment processes during this past year. He has also absented himself from department meetings. The merit evaluations that are being forwarded to you do not reflect the resolution of these issues. However, due to the time frame and pending legal interpretation, the department did the best job it could in completing the merit process.

JCB:ke
Attachment
cc: Interim Provost Davis
Randy Marnocha
Brenda Clayton

(Trial Ex. 818.)

The text of Trial Ex. 840 (a November 9, 1998 letter from Barnett to Petitioner) states:

November 9, 1998
Dr. Steve Albrechtsen
Department of Health, Physical Education, Recreation, And Coaching
University of Wisconsin-Whitewater
Whitewater, WI 53190

Dear Dr. Albrechtsen:

Your request to teach three workshops in the summer, 1999 has been forwarded to me. Please be reminded that in a memo to Larry Davis, Brenda Clayton, you, and me, dated March 17, 1998, the Chancellor stated that "...Wilderness and Electrocardiography Workshops are not authorized for offering" until certain assessments are conducted. A copy of the Chancellor's March 17, 1998 memo is attached. The Chancellor has reaffirmed his conditions as outlined in his March 17, 1998 memo. Therefore, if you wish to have these workshops considered, please provide me with a copy of your updated resume to start the process.

Sincerely,

Dr. Jeffrey C. Barnett, Dean
College of Education

Cc: Chancellor Greenhill

Provost David Prior
Dr. Brenda Clayton
bcc: Pat Brady

(Trial Ex. 840.)

The text of a Memorandum and Order entered by the district court on June 1, 2001 resolving the Board's Motion for Summary Judgment stated, at pages 3-4 and 7-9:

FACTS

...

On January 10, 1997 plaintiff brought a formal complaint under Chapter Six of the University of Wisconsin System Personnel Rules against tenured faculty of the HPERC. The complaint stated, "These members of the tenured faculty have repeatedly violated the rights of individuals, acted without regard for law and procedure and perpetuated an extremely hostile work environment in the Williams Center." On August 25, 1997 Greenhill accepted the recommendation of the investigating team and dismissed plaintiff's complaint.

Plaintiff directed a Human Resources Laboratory at UWW. In April 1997 Greenhill issued a moratorium preventing blood drawing and stress testing on human subjects in the laboratory until appropriate safety protocols were established. On August 28, 1997 Greenhill lifted the moratorium and implemented policies on Human Experimentation, Stress Testing and Blood Drawing.

On November 24, 1997 plaintiff wrote a letter to Dean Barnett complaining of violations of law and procedure committed by tenured faculty of HPERC during their review of Karen L. Barak for reappointment as a probationary faculty member. In

November 1997 and December 1998 plaintiff wrote additional letters informing Barnett of violations of law by the tenured faculty of HPERC.

...

MEMORANDUM

...

In deciding defendant's motion for summary judgment only events occurring between November 1, 1997 and September 5, 1998 will be considered [due to the constraints imposed by Petitioner's EEOC charge.] Furthermore, the only adverse employment actions taken against plaintiff occurred after March 10, 1998: not allowing him to teach two summer school workshops in 1998 and providing him with a lower merit increase than other HPERC professors in 1998.

Plaintiff contends he was retaliated against and discriminated against on the basis of his gender and sexual orientation when he was denied the opportunity to teach two summer workshops and a merit increase in 1998. To establish a *prima facie* case of retaliation plaintiff must show he engaged in statutorily protected expression, suffered an adverse employment action and that there is a causal link between the protected action and the adverse action. Smart v. Ball State University, 89 F.3d 437 (7th Cir. 1996.)

Plaintiff complained about discriminatory conduct in January 1997. He also complained about law violations by HPERC tenured faculty in November and December 1997 and January 1998. Prior to filing of these complaints Clayton had approved plaintiff's summer school workshops at Electrocardiography and Wilderness Medicine. She, however, raised concerns about these workshops for the summer of 1998 after he filed his complaints,

> and plaintiff was not allowed to teach these workshops.
>
> In June 1998 plaintiff was denied a merit increase as great as that received by the other full professors in HPERC. He received this lower merit increase after complaining of discrimination in 1997 and 1998.
>
> Clayton, Jones, Myers, Greenhill, Prior and Barnett assert in their affidavits that they did not deny plaintiff the opportunity to teach the two summer school workshops or provide him a lower merit increase in retaliation for opposing discrimination. Defendant argues these assertions entitle it to judgment in its favor on plaintiff's retaliation claim.
>
> From the undisputed facts, however, an inference could be drawn that these individuals acted with retaliatory motives because their actions were taken after plaintiff's complaints were received, and the reasons provided for their actions may not have been the real reasons. It remains disputed whether plaintiff was denied teaching opportunities and a merit increase in retaliation for complaining about discrimination. Defendant's motion for summary judgment on plaintiff's claim that defendant retaliated against him by denying him a higher merit increase and the opportunity to teach two summer school workshops in 1998 will be denied.

(Dkt. 45 (6/1/01 Memorandum and Order, pp. 3-4 and 7-9).)

The Board's brief supporting its Motion to Limit Evidence - referring to its Proposed Findings of Fact in the summary judgment proceedings as "DPFOF" - stated, at pages 6 to 8:

> Indisputably, plaintiff's EEOC charge attributed the 1998 actions which underlie the retaliation claims to female faculty members in the department having

retaliated against him because he "first formally complained that he was being discriminated against as a male in his employment" on "November 13, 1989" and because his "legal counsel" thereafter "registered specific complaints with then-Chancellor James R. Connor of the Whitewater campus of the University of Wisconsin commencing on or about December 21, 1990." (DPFOF 16 and 18, Responses and Replies.) It is also indisputable that, after July 14, 1991, when H. Gaylon Greenhill became Chancellor, James R. Connor was no longer Chancellor of UWW. (DPFOF 5, Response and Reply.)

In his EEOC charge, therefore, plaintiff expressly attributed the female faculty members' retaliatory intent to commit those actions challenged in that charge to gender discrimination complaints that he and his attorney made before Greenhill became Chancellor on July 14, 1991. (DPFOF 16 and 18, Responses and Replies.) Plaintiff presumably made conscious choices to assert these allegations - and to attribute retaliation to complaints made seven years before the alleged adverse actions - and should be held to those choices. [Citation omitted.] Assisted by counsel in the drafting of that charge, there is no reason that any leniency need be applied in reading that charge. [Citations omitted.]

The June 1, 2001 Order relied on complaints in 1997 and 1998 as an impetus for retaliatory conduct in 1998. (6/1/01 Order, p. 8.) Had the EEOC charge not specified when the alleged complaints were made, Title VII claims could conceivably have been pursued in court based on these 1997 and 1998 complaints. Had the EEOC charge specified those 1997 and 1998 complaints – as plaintiff was perfectly free to do when he and his attorney drafted

the charge – then he could indisputably pursue retaliation claims based on 1997 and 1998 complaints.

With the specific restriction in the charge to complaints that preceded July 14, 1991, however, and an attorney representing plaintiff having drafted and revised the charge documents, plaintiff must be taken at his word, and held to the consequences of those words. Plaintiff restricted his retaliation claims, when he filed the charging documents, to the gender discrimination complaints he made before Greenhill became Chancellor effective June 14, 1991. (DPFOF 5 and 18, Response and Reply.)

Under Seventh Circuit law, he could not walk away from the theory he propounded in the charge even if he had been unrepresented when that charge was filed. [Citation omitted] (Title VII claim barred because plaintiff, when *pro se*, did not file an EEOC charge "on this theory"). He could not pursue a theory different than the one expressly conveyed in the charge even if he had presented a theory regarding the 1997 and 1998 complaints in an intake questionnaire. [Citation omitted] ("[a]ny other approach would undermine the validity of the written word and encourage people either to close their eyes (hoping that they can reap the benefits without incurring the costs and risks of the venture) or to come up with hard-to-refute tales of not reading or understanding the documents they sign").

At trial, plaintiff should be restricted to retaliation claims that attribute the challenged actions in 1998

> to his having complained about gender discrimination before July 14, 1991. The evidence allowed at trial on his retaliation claims should be restricted accordingly.

(Dkt. 56 (6/8/01 Board brief, pp. 6-8), citations omitted to assure compliance with S.Ct.R. 15.3 and 24.3.)

The June 8, 2001 Joint Final Pretrial Report, at pages 12, 30 and 51, noted those of Petitioner's proposed trial exhibits containing copies of the January 10, 1997 letter, ultimately admitted, for limited purposes, as Trial Ex. 11, and summarized the Board's objections:

> 11. Complaint letter from Albrechtsen to Greenhill dated January 10, 1997. **The Board's Objections:** FRE 403, 801, 802.
>
> ...
>
> 30. Complaint letter from Albrechtsen to Greenhill dated January 10, 1997. (Document F-1) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).
>
> ...
>
> 33. Letter from Albrechtsen to Greenhill dated January 10, 1997, with attached memorandum from Greenhill to Albrechtsen and Rabe dated December 18, 1996. (Document F-4) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).
>
> ...
>
> 35. Letter from Albrechtsen to Greenhill dated January 10, 1997, with attached memorandum from Greenhill to Schauer dated December 19, 1996.

(Document F-6) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document)

...

475. Letter from Albrechtsen to Greenhill dated January 10, 1997. **The Board's Objections:** FRE 403, 801, 802.

(Dkt. 57 (6/8/01 Joint Final Pretrial Report, pp. 12, 30 and 51, emphasis in original.)

The June 8, 2001 Joint Final Pretrial Report displayed Petitioner's characterization of his proposed trial exhibits which contained communications by him "in November and December 1997 and January 1998" (Ap. 57a *supra*) and Respondent's objections to those proposed exhibits:

114. Disclosure letter from Albrechtsen to Barnett dated November 24, 1997. **The Board's Objections:** FRE 403, 801, 802.

...

121. Letter from Albrechtsen to Davis dated November 26, 1997. **The Board's Objections:** FRE 403, 801, 802.

...

123. Disclosure letter from Albrechtsen to Barnett dated December 10, 1997. **The Board's Objections:** FRE 403, 801and 802.

...

127. Disclosure letter from Albrechtsen to Barnett dated December 10, 1997. **The Board's Objections:** FRE 403, 801, 802.

...

132. Disclosure letter from Albrechtsen to Barnett dated December 23, 1997. **The Board's Objections:** FRE 403, 801, 802.

...

136. Disclosure letter from Albrechtsen to Barnett dated January 15, 1998. **The Board's Objections:** FRE 403, 801, 802.

...

141. Letter from Albrechtsen to Clayton dated January 22, 1998, with attached letter from Barnett to Albrechtsen dated January 16, 1998. **The Board's Objections:** FRE 403, 801, 802.

...

143. Disclosure letter from Albrechtsen to Barnett dated January 26, 1998. **The Board's Objections:** FRE 403, 801, 802.

...

147. Disclosure letter from Albrechtsen to Barnett dated January 28, 1998. **The Board's Objections:** FRE 403, 801, 802.

148. Letter from Albrechtsen to Davis dated January 28, 1998. **The Board's Objections:** FRE 403, 801, 802.

...

327. Letter from Albrechtsen to "Members of the Faculty Senate" dated November 10, 1997, with attached memorandum from Clayton to "All Members of the HPRC Department" dated April 21, 1997. **The Board's Objections:** FRE 403, 801, 802.

...

359. Letter from Albrechtsen to Clayton dated December 1, 1997, with attached merit materials. **The Board's Objections:** FRE 403, 801, 802.

360. Letter from Albrechtsen to Clayton dated December 8, 1997. **The Board's Objections:** FRE 403, 801, 802.

...

363. Letter from Albrechtsen to Clayton dated January 20, 1998, with attached memorandum from

Clayton to Albrechtsen dated January 8, 1998, memorandum from Bukowski to Clayton dated December 2, 1997, memorandum from Clayton to Albrechtsen dated January 8, 1998, and memorandum from Clayton to Albrechtsen dated January 12, 1998. **The Board's Objections:** FRE 801, 802.

...

434. Letter from Albrechtsen to Kozlowicz, De Paul and Epps via Barnett dated February 5, 1999, with attached disclosure letter from Albrechtsen to Barnett dated November 24, 1997, letter from Albrechtsen to Davis dated November 26, 1997, disclosure letter from Albrechtsen to Barnett dated December 10, 1997, disclosure letter from Albrechtsen to Barnett dated December 10, 1997, disclosure letter from Albrechtsen to Barnett dated December 23, 1997, disclosure letter from Albrechtsen to Barnett dated January 15, 1998, disclosure letter from Albrechtsen to Barnett dated January 26, 1998, disclosure letter from Albrechtsen to Barnett dated January 28, 1998, disclosure letter from Albrechtsen to Barnett dated February 4, 1998, disclosure letter from Albrechtsen to Barnett dated September 1, 1998, disclosure letter from Albrechtsen to Barnett dated September 2, 1998, disclosure letter from Albrechtsen to Barnett dated September 3, 1998, disclosure letter from Albrechtsen to Barnett dated September 4, 1998, disclosure letter from Albrechtsen to Barnett dated September 8, 1998, disclosure letter from Albrechtsen to Barnett dated September 9, 1998, disclosure letter from Albrechtsen to Barnett dated September 10, 1998, disclosure letter from Albrechtsen to Barnett dated November 18, 1998, disclosure letter from Albrechtsen to Barnett dated

September 11, 1998, disclosure letter from Albrechtsen to Barnett dated November 18, 1998, disclosure letter from Albrechtsen to Barnett dated January 19, 1999, disclosure letter from Albrechtsen to Barnett dated January 19, 1999, and disclosure letter from Albrechtsen to Barnett dated February 2, 1999. **The Board's Objections:** FRE 403, 801, 802, 901.

...

460. Letter from Albrechtsen to Clayton dated December 10, 1997. **The Board's Objections:** FRE 403, 801, 802.

...

463. Letter from Albrechtsen to Clayton, Dailey, Jones, Miller and Myers dated January 20, 1998. **The Board's Objections:** FRE 403, 801, 802.

...

478. Disclosure letter from Albrechtsen to Barnett dated November 24, 1997. (Attachment 1) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).

479. Letter from Albrechtsen to Davis dated November 26, 1997. (Attachment 2) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).

480. Disclosure letter from Albrechtsen to Barnett dated December 10, 1997. (Attachment 3) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).

481. Disclosure letter from Albrechtsen to Barnett dated December 10, 1997. (Attachment 4) **The Board's Objections:** FRE 403, 801, 802, 901, 1003

(Note: copy provided appears to be an attachment to another document).

482. Disclosure letter from Albrechtsen to Barnett dated December 23, 1997. (Attachment 5) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).

483. Disclosure letter from Albrechtsen to Barnett dated January 15, 1998. (Attachment 6) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).

484. Disclosure letter from Albrechtsen to Barnett dated January 26, 1998. (Attachment 7) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).

485. Disclosure letter from Albrechtsen to Barnett dated January 28, 1998. (Attachment 8) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document).

...

522. Letter from Albrechtsen to "Members of the Faculty Senate" dated November 10, 1997, with attached memorandum from Clayton to "All Members of the HPRC Department" dated April 21, 1997. **The Board's Objections:** FRE 403, 801, 802.

(Dkt. 57 (6/8/01 Joint Final Pretrial Report, pp. 21, 22, 23, 38, 41, 47, 49, 51 and 54, emphasis in original.)

The transcript of the Final Pretrial Conference at 6/22/01 Tr. 39/11-25, states:

> THE COURT: The Court will address the first motion and only motion that is pending [the Board's Motion to Limit Evidence and, based on the rationale articulated in the June 1, 2001 Order, t]he motion is then denied...

(6/22/01 Tr. 39/11-25.)

The transcript of the Final Pretrial Conference, at 6/22/01 Tr. 2, 3, 29, 49/2 to 50/21, 53/16-25 and 59/17-22, reflects that Petitioner's motions to admit Trial Exs 11, 30, 33 and 35 into evidence were denied while his motion to admit Trial Ex. 475, a copy of the January 10, 1997 letter, was reserved:

EXHIBIT LIST

No. Plaintiff	Description	Received
...		
11 -	Complaint letter from Albrechtsen to Greenhill 1/10/97	---
...		
30 -	Complaint letter from Albrechtsen to Greenhill 1/10/97	---
...		
33 -	Letter from Albrechtsen to Greenhill 1/10/97, and attachment	---
...		
35 -	Letter from Albrechtsen to Greenhill 1/10/97, and attachment	---
...		
475 -	Letter from Albrechtsen to Greenhill 1/10/97	Reserve

...
THE COURT: ...
Number 11, the January 10, 1997 Complaint. Mr. Moriarty.
MR. MORIARTY: Yes, Your Honor. This Complaint goes through just over five pages of allegations. It's sufficient that there was some Complaint out there. That can be testified to, but receiving this with all of its allegations is just going to create mini-trials. There are a –
THE COURT: Response.
MR. MORIARTY: There are a number of statements made that you already struck from the case regarding claims and allegations.
THE COURT: Response.
MR. LASKER: While it may have something to do with claims that have been stricken, it's relevant evidence and it's relevant in time, Your Honor. By January of 1997 we're getting into the thick of it, things that have to do with what happened in the summer of 1998 and in March of 1998 when the merit pay was denied. So I think that the 403 problem is -- if the problem is distance to the central issues that will be before the jury, the 403 problem no longer exists with this document.
THE COURT: Anything in reply?
MR. MORIARTY: Restate that. We believe we're –
THE COURT: You don't have restate.
MR. MORIARTY: All right.
THE COURT: I'd rather have you not be cumulative. You folks haven't done anything whatsoever to provide the Court any information since the final pretrial conference as it relates to these. So if you've

said something once, you don't have to repeat it. I don't need a restatement. I'd like –

MR. MORIARTY: Understood. Thank you, Your Honor.

THE COURT: -- what you may have specifically. We've been dancing around the bush now long enough. This is a letter to Chancellor Greenhill, is it not?

MR. MORIARTY: I think we -- yeah, I've said enough on it, Your Honor.

THE COURT: All right. And the Court has said enough as well and determines that this is hearsay and it will not be received. And whether you've objected to it or not, it's hearsay. That's what they used to call back in '57 as a selfserving statement. I don't think you fellas use that stuff anymore, but that's before they figured out it was hearsay. But that was an easy way of teaching people what it was I guess. And that's what we have here.

...

[THE COURT:] 30 is not received. ... 33 is not received. ... 35 is not received, and again although not so articulated this again would be hearsay as well as a waste of time and addressing issues to which the jury will not be required to make a determination. 36 is not received.

MR. LASKER: I beg your pardon, Judge. I did not hear the Court's ruling on 35. That was a no also then?

THE COURT: I'm sorry. 35, not received.

...

[THE COURT:] ... 475 the Court reserves, the Court believing this to be the January 1997 discrimination complaint. Don't really believe there's an opportunity for this Court to create an objection large enough to receive it, will not [sic] doubt not

receive it, but reserves for the impeachment purposes for which it may be used.

(Dkt. 87 (6/22/01 Tr. 49/2 to 50/21, 53/16-25 and 59/17-22).)

The transcript of the Final Pretrial Conference, at 6/22/01 Tr. 2 to 31, 55/2-3, 55/13-23, 57/18-22, 58/6-13, 59/4-9, 59/25 to 60/11, 61/2 and 62/15 to 63/14, reflects the following rulings regarding Petitioner's motions to admit those of his proposed trial exhibits which contained communications by him "in November and December 1997 and January 1998" (Ap. 57a *supra*), namely, Trial Exs. 114, 121, 123, 127, 132, 136, 141, 143, 147, 148, 327, 359, 360, 363, 434, 460, 463, 478, 479, 480, 481, 482, 483, 484, 485 and 522:

EXHIBIT LIST

No. Plaintiff	Description	Received
...		
114 -	Disclosure letter from Albrechtsen to Barnett 11/24/97	Reserve
...		
121	Letter from Albrechtsen to Davis 11/26/97	Reserve
...		
123	Letter from Albrechtsen to Barnett 12/10/97	Reserve
...		
127	Disclosure letter from Albrechtsen to Barnett 12/10/97	Reserve
...		
132	Disclosure letter from Albrechtsen to Barnett	Reserve

12/23/97

...

136	Disclosure letter from Albrechtsen to Barnett 1/15/97	Reserve

...

141	Letter from Albrechsten to Clayton 1/22/98 with attachment	Reserve

...

143	Disclosure letter from Albrechtsen to Barnett 1/26/98	Reserve

...

147	Disclosure letter from Albrechtsen to Barnett 1/28/98	Reserve

...

148	Letter from Albrechtsen to Davis 1/28/98	Reserve

...

[No notation regarding Trial Ex. 327]

...

359	Letter from Albrechsten to Clayton 12/1/97	Reserve
360	Letter from Albrechsten to Clayton 12/8/97	Reserve

...

363	Letter from Albrechsten to Clayton 1/20/98 with attachments	Reserve

...

[No notation regarding Trial Ex. 434]

...

460	Letter from Albrechsten to Clayton 12/10/97	Reserve

...		
463	Letter from Albrechsten to Clayton, Dailey, Jones, Miller and Myers 1/20/98	Reserve
...		
478	Disclosure letter from Albrechtsen to Barnett 11/24/97	---
479	Letter from Albrechtsen to Davis 11/26/97	---
480	Disclosure letter from Albrechtsen to Barnett 10/10/97 [actually 12/10/97]	---
481	Disclosure letter from Albrechtsen to Barnett 10/10/97 [actually 12/10/97]	---
482	Disclosure letter from Albrechtsen to Barnett 12/23/97	---
483	Disclosure letter from Albrechtsen to Barnett 1/15/98	---
484	Disclosure letter from Albrechtsen to Barnett 1/26/98	---
485	Disclosure	---
486	Disclosure letter from Albrechtsen to Barnett 1/28/98	---
...		
522	Letter from Albrechtsen to Members of the Faculty Senate 11/10/97 with attachment	Reserve
...		

[THE COURT:] ... The Court reserves on ... 114, ...
...
The Court will also reserve on 120 as it will on 120 through 129. ....The Court does reserve on 132...as well as on 136... reserve. ... The Court reserves on ... 141 through 148.
...As to 325, 326 and 328 the Court reserves [no mention of 327].
...The Court reserves on 359, reserves on 360. ... Reserved on 363. ...
... Reserve on 428 through 433. The Court again reluctantly reserves on 435 through 446 and reserves on 447 through 460 at page 40. Reserves on 461 through 463. [No mention of 434.]
...
The Court believes we're getting into duplication here as to 478. I believe 478 is the same as, at least when I read them, the same as 114 and so it's not received. 479 I believe is the same as 121 and so it's not received. 480 is the same as 123 and so it's not received. And you'll recall that the Court has reserved on their counterparts. 48[1] is the same as 128 to which the Court has already reserved so that's not received. 482 is the same as 132, that's not received. 483 is the same as 136, that's not received. 484 is the same as 143 and that's not received.
And for the same cumulative reasons those Exhibits 485 through 492 are not received. ...
... Reserve on 521 and 522 as well as 523...
...
Now the Court will be more precise when it finally receives from counsel their specific objections to those exhibits to which the Court has reserved and has heard the specific justification for the receipt thereof.

> This drill was based upon this Court's understanding of the case, understanding of the instructions and the special verdict which is to be provided, as well as the content relating therein. Where I've reserved I have erred on the side of plaintiff because all the Court is of the opinion that a good share of the reservations should not be provided to the jury. Nonetheless, it decides it's best to wait until you've had the opportunity to do your homework which I had asked you to do at the [initial] final pretrial conference so we could go through this in a timely manner to resolve it more to the satisfaction of the law than that which the Court believes may have occurred here.
> ... Seven o'clock Monday morning we'll return for those motions for reconsideration and those discussions of the exhibits upon which the Court has reserved.
> ...

(6/22/01 Tr. 2 to 31, 55/2-3, 55/13-23, 57/18-22, 58/6-13, 59/4-9, 59/25 to 60/11, 61/2 and 62/15 to 63/14.)

"Defendant's Objections to Remaining Plaintiff's Exhibits" filed by the Board before the 7:00 a.m. hearing on Monday, June 25, 2001, at pages 1, 2, 4, 12, 13, 36, 58, 59 and 64, stated the following regarding Trial Exs. 11, 30, 33, 35, 114, 121, 123, 127, 132, 136, 141, 143, 147, 148, 327, 359, 360, 363, 434, 460, 463, 475, 478, 479, 480, 481, 482, 483, 484, 485 and 522:

> Defendant, Board of Regents of the University of Wisconsin System, addresses those of Plaintiff's exhibits remaining after the court's rulings on June 22, 2001. The exhibits that were "not received" are noted below by being struck through (e.g., "~~struck through~~"). Focusing on the remaining

exhibits, the Board (a) withdraws its objection as to certain exhibits, such that they may be received subject to relevance, (b) awaits use at trial as to other exhibits, such that no further examination is required before trial and (c) elaborates on one or more of their objections to other exhibits, such that a pretrial determination of whether the exhibit should added to those "not received is requested.

...

~~11. Complaint letter from Albrechtsen to Greenhill dated January 10, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Not Received.~~

...

~~30. Complaint letter from Albrechtsen to Greenhill dated January 10, 1997. (Document F-1) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

...

~~33. Letter from Albrechtsen to Greenhill dated January 10, 1997, with attached memorandum from Greenhill to Albrechtsen and Rabe dated December 18, 1996. (Document F-4) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

...

~~35. Letter from Albrechtsen to Greenhill dated January 10, 1997, with attached memorandum from Greenhill to Schauer dated December 19, 1996. (Document F-6) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

...

114. Disclosure letter from Albrechtsen to Barnett dated November 24, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Barnett challenging how the faculty processed a personnel transaction involving probationary faculty member Barak. He makes hearsay assertions about what occurred at various meetings and legal arguments about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

121. Letter from Albrechtsen to Davis dated November 26, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen writes Davis challenging the process applied to probationary faculty member Barak in a reappointment request. He makes hearsay assertions about what occurred at various meetings and legal arguments about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

123. Disclosure letter from Albrechtsen to Barnett dated December 10, 1997. **The Board's Objections:** FRE 403, 801and 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Barnett asserting violations of the State Open Records law regarding the process applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings and legal arguments about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

127. Disclosure letter from Albrechtsen to Barnett dated December 10, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Barnett challenging the process applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings and legal arguments about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

132. Disclosure letter from Albrechtsen to Barnett dated December 23, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Barnett challenging the process applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings and legal arguments about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

136. Disclosure letter from Albrechtsen to Barnett dated January 15, 1998. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Barnett challenging the process applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings and legal arguments about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

141. Letter from Albrechtsen to Clayton dated January 22, 1998, with attached letter from Barnett to Albrechtsen dated January 16, 1998. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Clayton seeking to review "written ballots" purportedly used in faculty processes applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings. The alleged "written ballots" (Exs. 130 and 131) were "not received." Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

143. Disclosure letter from Albrechtsen to Barnett dated January 26, 1998. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Barnett regarding alleged violations of State open records law regarding the alleged use of "written ballots" in faculty processes applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings. The alleged "written ballots" (Exs. 130 and 131) were "not received." Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

147. Disclosure letter from Albrechtsen to Barnett dated January 28, 1998. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Barnett challenging the process applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings and legal arguments

about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

148. Letter from Albrechtsen to Davis dated January 28, 1998. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Davis challenging the process applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings and legal arguments about the consequences of his allegations. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

327. Letter from Albrechtsen to "Members of the Faculty Senate" dated November 10, 1997, with attached memorandum from Clayton to "All Members of the HPRC Department" dated April 21, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Pretrial review not required:** No further examination of this exhibit is needed before trial.

...

359. Letter from Albrechtsen to Clayton dated December 1, 1997, with attached merit materials. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Withdrawal of FRE 403 objections and statement that pretrial review not required:** The Board withdraws FRE 403 objections and states that no further examination of this exhibit is needed before trial.

360. Letter from Albrechtsen to Clayton dated December 8, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Cumulative. The Board notes that this letter, with the

attachments referred to in the letter, is marked as Ex. 821, which is received subject to relevance. The Board, as offeror of Ex. 821, has no intent to offer it for any improper hearsay purpose.

...

363. Letter from Albrechtsen to Clayton dated January 20, 1998, with attached memorandum from Clayton to Albrechtsen dated January 8, 1998, memorandum from Bukowski to Clayton dated December 2, 1997, memorandum from Clayton to Albrechtsen dated January 8, 1998, and memorandum from Clayton to Albrechtsen dated January 12, 1998. **The Board's Objections:** FRE 801, 802. **Ruling:** Reserved. **Pretrial review not required:** No further examination of this exhibit is needed before trial. The January 20, 1998 letter, without attachments (the form in which it was sent to Clayton, Barnett, Bukowski, Davis and Greenhill), was marked as Ex. 826, which was received subject to relevance. It is irrelevant that Albrechtsen sent the attachments to Ex. 363 to his advocates. The Board, as the offeror, has no intent to use Ex. 826 for any improper hearsay purpose.

...

434. Letter from Albrechtsen to Kozlowicz, De Paul and Epps via Barnett dated February 5, 1999, with attached disclosure letter from Albrechtsen to Barnett dated November 24, 1997, letter from Albrechtsen to Davis dated November 26, 1997, disclosure letter from Albrechtsen to Barnett dated December 10, 1997, disclosure letter from Albrechtsen to Barnett dated December 10, 1997, disclosure letter from Albrechtsen to Barnett dated December 23, 1997, disclosure letter from Albrechtsen to Barnett dated January 15, 1998, disclosure letter from Albrechtsen to Barnett dated

January 26, 1998, disclosure letter from Albrechtsen to Barnett dated January 28, 1998, disclosure letter from Albrechtsen to Barnett dated February 4, 1998, disclosure letter from Albrechtsen to Barnett dated September 1, 1998, disclosure letter from Albrechtsen to Barnett dated September 2, 1998, disclosure letter from Albrechtsen to Barnett dated September 3, 1998, disclosure letter from Albrechtsen to Barnett dated September 4, 1998, disclosure letter from Albrechtsen to Barnett dated September 8, 1998, disclosure letter from Albrechtsen to Barnett dated September 9, 1998, disclosure letter from Albrechtsen to Barnett dated September 10, 1998, disclosure letter from Albrechtsen to Barnett dated November 18, 1998, disclosure letter from Albrechtsen to Barnett dated September 11, 1998, disclosure letter from Albrechtsen to Barnett dated November 18, 1998, disclosure letter from Albrechtsen to Barnett dated January 19, 1999, disclosure letter from Albrechtsen to Barnett dated January 19, 1999, and disclosure letter from Albrechtsen to Barnett dated February 2, 1999. **The Board's Objections:** FRE 403, 801, 802, 901. **Ruling:** (No notes, on the defense side, of any ruling.) **Elaboration:** This document - dated four months after the EEOC charge was filed - related to personnel transactions involving various probationary faculty members and academic staff members and efforts by the Administration to address disputes among tenured faculty within the Department. If admitted, considerable testimony, now unnecessary, would be required to address the resultant potential for confusion and prejudice to the Board. Instead of being confined to the narrow trial issues, the trial could be opened up to disputes over the lengthy history of problems within the

Department that was excluded through prior orders. It also, through its attachments, would bring in numerous documents which have, as separate documents, already been "not received" by the court or which should, for reasons noted above, not be received. (November 24, 1997 letter (Ex. 123), November 26, 1997 letter (Ex. 121), December 10, 1997 letter (Ex. 123), December 23, 1997 letter (Ex. 132), January 15, 1998 letter (Ex. 136), January 26, 1998 letter (Ex. 143), January 28, 1998 letter (Ex. 147), September 1, 1998 letter (Ex. 160), September 2, 1998 letter (Ex. 162), September 3, 1998 letter (Ex. 166), September 4, 1998 letter (Ex. 168), September 8, 1998 letter (Ex. 179), September 9, 1998 letter (Ex. 200), September 10, 1998 letter (Ex. 202), November 18, 1998 letter (Ex. 220), January 19, 1999 letter (Ex. 222) and February 2, 1999 letter (Ex. 226). The February 4, 1998 and September 11, 1998 letter which are attachments to the cover letter dated February 5, 1999 are not separate exhibits but are equally concerned with matters of no or tangential relevance to the trial issues. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

460. Letter from Albrechtsen to Clayton dated December 10, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Clayton regarding faculty processes purportedly applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

463. Letter from Albrechtsen to Clayton, Dailey, Jones, Miller and Myers dated January 20, 1998. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Albrechtsen wrote Clayton regarding faculty processes purportedly applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

475. Letter from Albrechtsen to Greenhill dated January 10, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Though Albrechtsen now identifies this letter as a gender discrimination complaint underlying his retaliation, despite contrary identifications in the EEOC charge, he is not entitled to admission of this letter - the contents of which would open up the tangled history of disputes within the Department that the court has carefully, and properly, keep out of this trial. Admitting this exhibit could require witnesses, not now contemplated, to present testimony on many issues beyond the scope of the trial issues. Albrechtsen challenges many faculty processes purportedly applied to personnel transactions involving various probationary faculty members and academic staff members. He makes hearsay assertions about what occurred at various meetings. Confusion, waste of time, hearsay. **Request:** This exhibit should be "not received."

...

~~478. Disclosure letter from Albrechtsen to Barnett dated November 24, 1997. (Attachment 1) **The Board's Objections:** FRE 403, 801, 802, 901, 1003~~

~~(Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

...

~~479. Letter from Albrechtsen to Davis dated November 26, 1997. (Attachment 2) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

~~480. Disclosure letter from Albrechtsen to Barnett dated December 10, 1997. (Attachment 3) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

...

~~482. Disclosure letter from Albrechtsen to Barnett dated December 23, 1997. (Attachment 5) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

~~483. Disclosure letter from Albrechtsen to Barnett dated January 15, 1998. (Attachment 6) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

~~484. Disclosure letter from Albrechtsen to Barnett dated January 26, 1998. (Attachment 7) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

~~485. Disclosure letter from Albrechtsen to Barnett dated January 28, 1998. (Attachment 8) **The Board's Objections:** FRE 403, 801, 802, 901, 1003 (Note: copy provided appears to be an attachment to another document). **Ruling:** Not Received.~~

...

522. Letter from Albrechtsen to "Members of the Faculty Senate" dated November 10, 1997, with attached memorandum from Clayton to "All Members of the HPRC Department" dated April 21, 1997. **The Board's Objections:** FRE 403, 801, 802. **Ruling:** Reserved. **Elaboration:** Cumulative (same document as Ex. 327.) Other objections can, if needed, await trial. **Request:** This exhibit should be "not received."

(6/24/01 "Defendant's Objections to Remaining Plaintiff's Exhibits, pp. 1, 2, 4, 12, 13, 36, 58, 59 and 64.)

The transcript of the first day of trial before voir dire, at 6/25/01 Tr. 1-2 to 1-11, 1-12/11-25, 1-14/4-22, 1-22/12-14, 1-24/7-16, 1-25/18 to 1-25/4, 1-32/11-13, 1-36/23 to 1-1-37/15, 1-38/14 to 1-39/15, 1-40/22 to 1-41/4, 1-44/21 to 1-45/6 and 1-47/16 to 1-50/20, reflects the following regarding Trial Exs. 11, 30, 33, 35, 114, 121, 123, 127, 132, 136, 141, 143, 147, 148, 327, 359, 360, 363, 434, 460, 463, 475, 478, 479, 480, 481, 482, 483, 484, 485 and 522:

EXHIBIT LIST

No. Plaintiff	Description	Offered	Received
11 -	Complaint letter from Albrechtsen to Greenhill 1/10/97	183	Reserve
...			
[30, 33 and 35 not listed.]			
114 -	Disclosure letter from Albrechtsen to Barnett 11/24/97	---	---
...			
121	Letter from Albrechtsen to Davis 11/26/97	---	---

...

...

123	Letter from Albrechtsen to Barnett 12/10/97	---	---

...

127	Disclosure letter from Albrechtsen to Barnett 12/10/97	---	---

...

132	Disclosure letter from Albrechtsen to Barnett 12/23/97	---	---

...

136	Disclosure letter from Albrechtsen to Barnett 1/15/97	---	---

...

141	Letter from Albrechsten to Clayton 1/22/98 with attachment	---	---

...

143	Disclosure letter from Albrechtsen to Barnett 1/26/98	---	---

...

147	Disclosure letter from Albrechtsen to Barnett 1/28/98	---	---

...

148	Letter from Albrechtsen to Davis 1/28/98	---	---

...

[No notation regarding Trial Ex. 327]

...

359	Letter from Albrechsten	---	---

	to Clayton 12/1/97		
360	Letter from Albrechsten to Clayton 12/8/97	---	---

...

[No notation regarding Trial Exs. 363, 434, 460, 463, 478, 479, 480, 482, 483, 484, 485, or 522]

...

THE COURT: ...

We then return to the exhibits. The Court has received a memorandum from the defendants providing the objections they have to the remaining plaintiff's exhibits. We will be reaching that this morning. The Court believes that the, perhaps the best way is to hear at this time those motions for reconsideration of the plaintiff.

MR. LASKER: Your Honor, I have a motion for reconsideration with regard to believe it's altogether 33 exhibits.

THE COURT: All right. Start with the first one that you wish to discuss.

MR. LASKER: That would be No. 189 [excluding, from Petitioner's reconsideration request, Trial Exs. 11, 30, 33 and 35 which were not received].

[Discussion of exhibits preceding Trial Ex. 189.]

THE COURT: ...

The whole purpose of this is not to waste your time but to save some time to make these determinations. I'm talking only because of the fact that I don't like a lot of silence this early in the morning. I am not receiving those which have previously been reserved [including Trial Exs. 114 and 121, 123, 127, 132, 136, 141, 143, 147, 148] until I get to 189.

...

[THE COURT:] ...

All right, 236 is the next one.

MR. LASKER: No, the next one that I would seek to make a case for, Your Honor, is No. 299.

...

THE COURT: And you believe that this is a discriminatory intent that was demonstrated by virtue of that memorandum dated September 26th of 1997 [Trial Ex. 299] and the activities to which it related. Is that your proffer?

MR. LASKER: Well, I think it actually was in retaliation against the January 10, 1997 complaint that Dr. Albrechtsen made to Chancellor Greenhill which was a reiteration of his assertion to the chancellor that he and people associated with him were being subjected to gender discrimination.

...

THE COURT: The Court's going to reserve [regarding Trial Ex. 299] only for the purposes of setting forth a full and complete determination as to the Court's previous position and why it does believe that it is appropriate that it be maintained. But I will reexamine it and provide you with that information prior to the time that we begin the trial. I reserve on 299 at this time for the purpose of providing that clarification that may be necessary. Next.

MR. LASKER: The next that I wish to be heard on is No. 333, Your Honor.

MR. MORIARTY: [On "Defendants' Objections to Remaining Plaintiff's Exhibits", l]ooks like we start with 325.

THE COURT: All right, 333. ...

...

THE COURT: I've got 359 is not received. I've got 360 is not received. ...

...

MR. LASKER: The next exhibit which the plaintiff wants to be heard is Exhibit 403. 403 --

MR. MORIARTY: I'm sorry. 378, 379, 380 [as to which rulings were reserved on June 22, 2001 and "Defendants' Objections to Remaining Plaintiff's Exhibits" requested that they not be received] no problem?
THE COURT: We understand that.
MR. MORIARTY: Yes.
THE COURT: Let's move to 403, Mr. Moriarty?
MR. MORIARTY: So it's not received if we get there. I understand. Thank you, Your Honor.
THE COURT: I'll draw you a picture when we're through. Now we're at 403, request for reconsideration of the ruling of the Court which reserved on 403. Mr. Moriarty wants the Court not to receive 403. The Court said just because it's 403, and that's what's been going on all afternoon, the Court is not going to deny the receipt thereof, it will reserve. And that's what I did. Mr. Lasker now wants it received. I'll hear those additional comments that you have relating thereto.
MR. LASKER: ...
...
THE COURT: And this exhibit [Trial Ex. 403] --
MR. MORIARTY: This would be a mini-trial.
THE COURT: -- is not going to be received.
MR. MORIARTY: Thank you.
THE COURT: I did an audible at the line. My original remarks that I penciled in was not received because this is ancient history prior to November 1 of 1997. For some reason I fell off the boat and I reserved. It will not be received. I am now more adamant than previously and believes that this is one of those exhibits which the Court has been concerned with throughout. It shall be received.
And now I suppose you want 404 as well.
MR. LASKER: No.

THE COURT: Oh. Next.
MR. LASKER: We're going to jump all the way to 560, Your Honor.
THE COURT: All right. Want me to give you a speech about 406 and 407, Mr. Briles Moriarty, or do you think you're getting the picture.
MR. MORIARTY: I've got the picture, Your Honor.
THE COURT: I haven't because in my ramblings I've failed to set down the exhibits that Mr. Lasker wants to get to. 506?
MR. LASKER: 560, 560 [passing by Trial Exs. 434, 460, 463, 478, 479, 480, 481, 482, 483, 484, 485 and 522].
THE COURT: My goodness. You may proceed, sir.
...
MR. LASKER: ... My next request would be regarding Exhibit 570.
THE COURT: All right.
MR. LASKER: That's an exhibit which I understand the Court reserved on on Friday.
THE COURT: Right.
MR. LASKER: And we think it should be admitted.
...
...
THE COURT: Well, get your exhibits ready. Mr. Moriarty, in the event the Court should rule adversely to your position. I am taking this under advisement as well. Reserved.
MR. MORIARTY: Thank you.
MR. LASKER: And I have no further motions with regard to exhibits, Your Honor.
THE COURT: All right. Anything further on exhibits, Mr. Moriarty?
MR. MORIARTY: No, Your Honor. We'll await your ruling....
...

> [After a recess from 8:05 to 8:50 a.m.]
> THE COURT: [summarizing the alleged events earlier than November 1, 1997]
> ...[The Court] was pretty specific to suggest that there would be a period of time which the Court would be examining, at least the jury would be examining, and in deciding defendant's motion [for summary judgment] not only was the testing to which the Court has now referred once again excluded but it indicated that only events occurring between November 1 of '97 and September 5, 1998 will be considered. And the fact is that even the doctor [Petitioner] didn't think as much about that concern as he does now, having not brought that under the tent in the filing [of the EEOC charge] thereof.
> ...
> And accordingly, it's confusing, it's issues which are not appropriate to be considered by the jury, it's a waste of time and the prejudice of all that far outweighs the limited probative value that would be produced were the court to allow those Exhibits 235, 299 and those in the 500 series, and accordingly they are not received.

(6/25/01 Tr., 1-2 to 1-11, 1-12/11-25, 1-14/4-22, 1-22/12-14, 1-24/7-16, 1-25/18 to 1-25/4, 1-32/1-13, 1-36/23 to 1-37/15, 1-38/14 to 1-39/15, 1-40/22 to 1-41/4, 1-44/21 to 1-45/6 and 1-47/16 to 1-50/20.)

The transcript of the first day of trial at 6/25/01 Tr. 1-102/13 to 1-104/19 reflects the following colloquy between the court and counsel about how to state objections to alleged events, other than the January 10, 1997 letter, outside the November 1997 through September 1998 window defined in the June 1, 2001 Memorandum and Order:

MR. LASKER: [Stating an order of witnesses including] Mary Anne Hedrich … Ann Ward and James Molloy …

…

MR. MORIARTY: I might point out that Mary Anne Hedrich, we're talking about someone who left the University in 1995. Ann Ward, we're talking about the blood drawing and stress testing that was excluded, and James Molloy was an investigator --

THE COURT: Fine.

MR. MORIARTY: -- that did the fact-finding. So we --

THE COURT: So you just make your appropriate motions and --

MR. MORIARTY: Very good. We will.

THE COURT: -- you call them. You call them. We didn't have any motions in limine so I guess you just make a motion and I think we'll call it relevance, if you can remember that. Relevance. And there are a lot of relevance objections.

MR. MORIARTY: Thank you.

THE COURT: So you might say June 1st order, relevance.

MR. MORIARTY: Thank you.

THE COURT: … But if indeed it does stray beyond the parameters, I think they're as tight as I can make them. And I will sustain any motion based on your objection of relevance, June 1 order, if you believe it strays from the rulings of the Court.

MR. MORIARTY: Thank you, Your Honor.

THE COURT: That goes for both sides.

MR. LASKER: Thank you very much.

The transcript of the first day of trial at 6/25/01 Tr. 1-107/23 to 1-108/5 reflects the following comments by Petitioner's attorney during his opening statement to the jury:

> [MR. LASKER:] In July -- I'm sorry. In January of 1997 Dr. Albrechtsen formally complained in writing to Gaylon Greenhill, who was the chancellor of the University, about the unfair discrimination against him and against those women who were being unfairly treated because of their association with him as a man. And those women in question were Dr. Mary Anne Hedrich, Dr. Karen Barak and two other members of the faculty named Nancy Krattiger-Ziltener and Jane Sandusky.

(6/25/01 Tr. 1-107/23 to 1-108/5.)

The transcript of the first day of trial at 6/25/01 Tr. 1-135/21 to 137/21 reflects the following direct examination of Petitioner by his attorney:

> Q Did you ever have occasion to complain to any official at the University of Wisconsin at Whitewater that you believed you were being subjected to discrimination based upon your male gender?
> MR. MORIARTY: Leading.
> THE COURT: Sustained.
> BY MR. LASKER:
> Q Did you ever complain on any subject formally to any administrator of the University of Wisconsin at Whitewater?
> [STEVEN J. ALBRECHTSEN] Yes, I did.
> Q On what subject matters did you complain?
> A The first time that I complained I complained particularly about, I think I worded it as bias against males in my department.

Q And what did you -- To whom did you make such a complaint?
A To the chancellor of the University.
Q And when was it that you -- Was that in writing?
A It was a written complaint.
Q Okay. And when was it that you lodged that complaint?
A It was in I believe November of 1989.
Q And who is it that you were complaining was subjecting you to that discrimination?
MR. MORIARTY: June 1 order.
THE COURT: Sustained.
BY MR. LASKER:
Q Did you have occasion to complain on that subject to any other official at the University after that initial complaint?
A Yes, I did.
Q To whom?
A Probab-
MR. MORIARTY: Foundation.
THE WITNESS: To whom?
THE COURT: Sustained.
BY MR. LASKER:
Q When was the next time that you made such a complaint?
A The next time that I recall formally making such a complaint was in January of 1995.
Q And to whom did you make that complaint?
A To the chancellor.
MR. MORIARTY: June 1 order, Your Honor.
THE COURT: Sustained.
BY MR. LASKER:
Q Did you complain to anybody in an official capacity at the University about such a similar complaint again after the time in 1995 you just testified to?

A Yes, I did.
Q And when did you do that?
A I do not recall precisely.
Q Approximately then.
A Probably about 1998.

(Tr. 1-135/21 to 137/21.) Petitioner's attorney then turned to having him to identify his Department chairs from the time he started at UW-Whitewater. (Tr. 1-137/21-25.)

The transcript of the first day of trial at 6/25/01 Tr. 1-154/24 to 160/5 reflects the following direct examination of Petitioner by his attorney:

BY MR. LASKER:
Q Based upon your years as a member of the community in which you live and work, Dr. Albrechtsen, can you tell us whether or not Dr. Clayton has a reputation in the community in which she lives and works regarding her sexual orientation?
A Yes, she does.
MR. MORIARTY: Objection. Objection. Relevance, foundation, reputation evidence.
THE COURT: Sustained.
BY MR. LASKER:
Q Have you ever had occasion to complain to anybody at the University of Wisconsin specifically about gender-based discrimination against you by Dr. Clayton?
MR. MORIARTY: Leading.
THE COURT: Foundation. Sustained.
BY MR. LASKER:
Q Did you have occasion to ever file a written complaint regarding the subject of gender-based discrimination with Dr. Greenhill in 1997?

A Yes, I did.
Q And what was the -- Was that in writing?
A Yes, it was.
Q Do you recall the approximate date of that?
A I believe it was January 10th of 1997.
Q And what was the nature of the complaint that you registered with Dr. Greenhill at that time?
A I was complaining about a pattern and practice of discrimination against males and against heterosexual women, specifically people who were associated with me.
Q And did you specify which women you were referring to in that regard?
A In terms of who was being discriminated against because of their association with me?
Q Yes.
A Yes, I did.
Q And who did you identify?
A Nancy Krattiger-Ziltener, Jane Sandusky, Mary Anne Hedrich and Karen Barak.
Q Who was Nancy Krattiger-Ziltener?
A Nancy Krattiger-Ziltener prior to her termination was the women's gymnastics coach at the University of Wisconsin Whitewater and also taught courses in my department.
Q You've just mentioned that she was terminated?
A Yes, she was.
Q When did that occur?
A I believe in 1995. Yes.
Q Who is Ms. Sandusky?
A Jane Sandusky is or was the women's athletic trainer and also taught courses in my department, including specifically courses in anatomy and physiology.
Q Did you have a professional relationship with her?

A Yes, I did. We worked very closely together.
Q Were you friends and colleagues?
A Yes.
Q Was that known to the department?
A Yes, it was.
Q What was the nature of your relationship, how would you describe in your own words, with Nancy Krattiger-Ziltener?
A Nancy Krattiger-Ziltener –
MR. MORIARTY: June 1 order. I'm sorry. June 1 order.
THE COURT: Overruled.
THE WITNESS: With Nancy Krattiger-Ziltener, she was the women's gymnastics coach and I worked with her on a number of projects involving the application of exercise science and the things that I do in my laboratory to her coaching of gymnastics. Things, for instance, related to assessing the body composition of her athletes and performing other physical tests on her athletes.
BY MR. LASKER:
Q And how would you characterize in your own terminology the nature of your relationship with her?
A We certainly worked well together. We didn't work as closely or as extensively as I did with Jane Sandusky, but we certainly had a very good and frequent working relationship.
Q To your knowledge was that known also in the department?
A Yes, it was.
Q Now you mentioned Mary Anne Hedrich also in this –
A Yes.
Q -- complaint to the chancellor?
A Yes, I did.

Q And what is it that you contended -- Strike that. Who was Mary Anne Hedrich?
A Mary Anne Hedrich was a probationary faculty member at the University of Wisconsin-Whitewater.
Q And what was the nature of her relationship with you?
MR. MORIARTY: June 1 order, Your Honor.
THE COURT: Overruled.
THE WITNESS: She and I worked very closely together on a wide variety of projects. She was probably one of the two people in the department at the time that I worked most closely with, including things in the area of teaching, things in the area of research and things in the area of service.
BY MR. LASKER:
Q And what was the nature of your complaint about what occurred to Dr. Hedrich as a result of her association with you?
MR. MORIARTY: June 1 order.
THE COURT: Foundation. Sustained.
BY MR. LASKER:
Q Did you say in the letter what you were complaining about with regard to Dr. Hedrich?
A Yes, I did.
Q What did you say in the letter?
MR. MORIARTY: Cumulative.
THE COURT: Sustained. The exhibit's been received if it is that which the witness has previously testified to.
Members of the jury, there have been a number of documents referred to, not all by letter, but we do at least have two of them which you will be able to look at and that's 333 and 362. For a witness then to tell us the content thereof is cumulative because of the fact that if indeed the exhibits are appropriately marked, brought to your attention, they will then be

in your possession during the course of your deliberations to determine the content thereof.
MR. LASKER: Thank you, Your Honor.
BY MR. LASKER:
Q Who is Karen Barak?
A Karen Barak was also a probationary faculty member in the department.
Q And what is the nature of her relationship with you?
A Karen Barak and I live together.
Q And when did you -- In a personal relationship?
A Yes.
Q In a sexual relationship?
A Yes.
Q When did you first become involved with each other in that relationship?
A I believe in the fall of 1994.
Q And to your knowledge did it become known in the department at or about that time that you were in such a relationship?
A Certainly shortly after that.

(Tr. 1-154/14 to 1-160/5.) Petitioner's attorney then commenced asking him about the 1998 merit pay process. (Tr. 160/6-14.)

The transcript of the first day of trial at 6/25/01 Tr. 1-182/21 to 1-184/6 reflects discussions, without the jury present, regarding Trial Ex. 11:

MR. LASKER: Your Honor, excuse me. I have a matter that I have to raise with the Court before the jury comes back. The Court stopped me from questioning Dr. Albrechtsen regarding some of what he had said to Chancellor Greenhill in the January 10, 1997 complaint letter. And I've during

> the break double-checked the status of that exhibit and it has not been received and —
> THE COURT: You'll have to move to get that done you understand.
> MR. LASKER: I'm doing so now.
> THE COURT: All right. Any objection?
> MR. MORIARTY: Uhm –
> THE COURT: The Court will reserve. Ask the jury to join us.
> MR. MORIARTY: Which do you have that marked as?
> MR. LASKER: 11.
> MR. MORIARTY: 11?
> (Jury in at 2:04 p.m.)

The transcript of the first day of trial at 6/25/01 Tr. 1-220/2-3 and 1-227/10 to 1-230/15 reflects Petitioner resting his case-in-chief and the district court, in denying the Board's subsequent motion for judgment as a matter of law, articulating its reasons for that ruling:

> MR. LASKER: Your Honor, the plaintiff rests.
> THE COURT: All right. The defendant may proceed.
> ...[Jury excused and the Board made an oral motion for judgment as a matter of law.]
> THE COURT: Well, the Court regardless of the failure of reasonable corroboration which is not necessary if the jury accepts the circumstantial evidence which has been provided to us by the plaintiff, the fact is he did go from number one to number eleven. That's in the record. It was shortly after he did make the complaint which was on January 17th [sic] of 1997, and although the claim with the agency was filed substantially later which would not even include that period,

the fact of the matter is that is the ongoing conduct which this Court is familiar with and does believe is appropriate in order to allow his claim to proceed.

And set forth therein was the comments relating to the discriminatory treatment that he believed had happened to him and to others. Now what happened to others is not relevant as it plays out in this matter because they didn't know anything about these two incidents which this plaintiff is claiming; at least they didn't know sufficient enough to be asked a question relating thereto.

And so there is, however, that case that would suggest that there was the speaking out on an activity, protected speech, and that accordingly there was indeed actions taken within a reasonable period of time thereafter, each of which had to do with the elimination of workshops number two, one and two, and the merit pay raise. So you've got that. That's out there very clear. Not as many as it would be had this case proceeded I suppose when they took an opportunity strategically to stop at the time in which they were ahead. I don't say this to be derogatory but it just seems to me that's the case.

I wish Arthur DeBardeleben was here to explain to you folks who come along thereafter. He used to try them in one-half day and win them all. His First Amendment case related to a person walking into a triple A meeting which was sponsored by the state in order to keep a driver's license. There was a picture of Jesus on the wall and he claims he didn't have to take that because there's religion involved in the keeping of a driver's license. The jury deliberated for three days, came back with a hung jury, and the five lawyers that represented the other side decided to change the law.

But those are the things that used to happen in this court. Now, in any event, the fact is that's a case. That's their case. It came in. It's been unrebutted also. The foundational argument which the Court believes would have been necessary never materialized as to the sexual orientation which need come out and it does give the jury pause as to wonder as to whether or not this did happen because of the sexual orientation, wondering whether or not these actions which have been taken were for the very reasons of discriminatory treatment.

That's awfully clear that that, it could be the circumstantial evidence. Of course there's no evidence, direct evidence, of discrimination and you didn't expect there to be. Mr. Lasker told us that. He told us there was no smoking gun and there never is in a case for this, but that doesn't foreclose the plaintiff from proceeding in result of the extension of the McDonnell Douglas, except as Judge Easterbrook says, Why do we use that? There's not even a McDonnell Douglas anymore. Maybe we'll call it Lear next time around.

The fact of the matter is you know it's all outdated but it's all there. And although they keep getting around that prima facie case, nonetheless it's too soon to stop. Tried to stop a case a year and a half ago and maybe it was years, Mr. Lasker.

MR. LASKER: Might well have been.

THE COURT: And they sent them back and do it over again. So I do believe there is enough before a reasonable jury to make the determination that those four questions in the special verdict could be answered in the affirmative. There's nothing to suggest that a reasonable jury would not accept the credibility of the witness who testified thereto and there really is nothing in opposition thereto. And it's

ripe. There are exhibits which have been received which may very well be appropriate as it relates to the comparison of the two. But whether there's a comparison or not, it's pretty unusual to go from 1 to 11 unless you're a Cub and then you go from the 24th to the 1st, and they're going to blow that if they keep playing like they did yesterday.
All right. We're going to stand in recess and come back at 20 minutes to the hour.
MR. LASKER: Thank you, Your Honor.

(6/25/01 Tr. 1-220/2-3 and 1-227/10 to 1-230/15.)

The transcript of the first day of trial at 6/25/01 Tr. 1-265/9-25 reflects the following direct examination of Clayton by a Board attorney:

Q During the fall of '97 through the spring of 1998 what, if any, prior complaints by Steven Albrechtsen of sex discrimination were you aware of?
A To my knowledge I don't know if there were any on sex discrimination. There'd been a complaint against the tenured faculty but I don't remember if it involved that or not.
Q All right. In taking the actions that you took regarding the merit pay process in 1998 what, if any, consideration did you give to whether Steven Albrechtsen had or had not previously complained about sex discrimination?
A The consideration that I had in filling out the merit form was what the information was that was requested on the merit form. And there were merit -- it simply asked for student evaluations. That's the only thing I believe on that score that I affected in any way and it, it just seemed unreasonable that he

would continue to be promoted and get raises if he wasn't reporting student evaluation forms.

(Tr. 1-265/9-25.)
The transcript of the first day of trial at 6/25/01 Tr. 1-268/3 to 1-269/22 reflects the following direct examination of Clayton by Respondent's attorney:

Q Do you recall in the fall of 1996 whether you were asked to approve anything for the following summer session? Do you have any recollection one way or another on that?
A No, I was not. I did not learn until later about it.
Q Directing your attention to 841, a memo from Steven Albrechtsen to Bruce Bukowski, October 22nd, 1998. ... It is the fourteenth page in the exhibit for future reference. At the top it says University of Whitewater -- University of Wisconsin-Whitewater Workshop Proposal Form and has a date and the date written in looks like November 25, 1996, correct?
A That's correct.
Q All right. Is that your signature -- is that or is that not your signature on there?
A It is not my signature where it says department chair. Someone else has signed it and initialed.
Q Okay. And what initials appear next to your name?
A It appears to be B something B. I would guess that's Bruce Bukowski. I'm not even sure what his middle name is.
Q Okay. So this form that -- What is the nature of this form? What is it as far as you know?
A This is called the cover sheet and the cover sheet goes with everything else, the outline, the proposal, whatever is supposed to be submitted. And this is

the sheet that has to be on the front. This is where the department chair signs off.
Q I see. So in November of 1996 as of that date had you or had you not approved the Wilderness Medicine course that this applies to?
A No, I had not approved it and I did not sign it because I was not there.
Q Where were you?
A I was in Portugal.
Q At that time?
A On that date.

(6/25/01 Tr. 1-268/3 to 1-269/22.)

The transcript of the first day of trial at 6/25/01 Tr. 1-276/6-25 reflects the following direct examination of Clayton by Respondent's attorney:

Q In raising the concerns you raised about the workshops in March of 1998 what, if any, consideration did you give to Steven Albrechtsen being a male?
A None.
Q And why can you say that?
A What -- What -- Whether you're male or female has nothing to do with your qualifications to teach a workshop. The concerns were what was the nature of the workshop, what was the extent of -- what was he going to do to take the cardiog--the electrocardiography and what his background was. It was a matter of qualification and it was a matter of the mission of the department.
Q And once again in raising the concerns, to what extent did you give consideration whether he had or had not previously complained about sex discrimination?

A None.
Q And why once again?
A I don't have a memory of him complaining in any way about sex discrimination. He complained about everything but not that.

(Tr. 1-276/6-25.)

The transcript of the first day of trial at 6/25/01 Tr. 1-309/25 to 1-311/25 reflects the following cross-examniation of Clayton by Petitioner's attorney:

Q Could you direct your attention to Exhibit 838? Again the fourteenth page of that.
A Correct.
Q You testified that that's not your signature and that you believe those are Dr. Bukowski's --
A No. that's not what I said. When I wrote the memo I knew, I knew that he had taught them because I checked. I don't remember whether or not I knew that in the past because I don't -- I don't -- I don't actually remember everything that's being taught this summer, believe it or not.
MR. MORIARTY: Excuse me. Are we talking about 841? That's Steve Albrechtsen's memo?
THE COURT: Let's proceed in the confusion in which we find ourselves --
MR. MORIARTY: Fine. Leave it alone.
THE COURT: -- Mr. Moriarty, without adding to it.
MR. MORIARTY: Sorry, Your Honor.
BY MR. LASKER:
Q Let me -- I was -- That is correct that I had jumped inadvertently to Exhibit 841 and I didn't mean to. Let me get back to 848. I'm sorry I'm finding -- 838. 838. That is a memorandum from

you to Jeff Barnett and Chancellor Gaylon Greenhill, correct?

A That's correct.

Q And that's dated March 4 of 1998?

A That's correct.

Q And that is where you first register with them a desire to talk to them about this subject, correct?

A That's correct.

Q And the title of this memo from you to them is Workshops Previously Approved for Dr. Steven Albrechtsen.

A That's correct.

Q Now referring your attention to 841, if I may, and to that I believe fourteenth page of it which is the workshop proposal form. If I understood you correctly, and I'm quite sure I did, but that you said that the signature in the space delineated department chair approval signature is not your signature? That your name --

A My page doesn't have a signature.

MR. LASKER: May I approach the witness, Your Honor?

THE COURT: Yes

THE WITNESS: I have one in the back. This is it. The one I had up here does not have a signature. None of these do.

BY MR. LASKER:

Q Right. I was referring to the fourteenth page. I believe --

A My pages aren't numbered.

Q Am I correct that it is the fourteenth page?

MR. MORIARTY: If I might approach, we could find it. I'm sorry.

(6/25/01 Tr. 1-309/25 to 1-311/25.)

The transcript of the second day of trial at 6/26/01 Tr. 2-2 to 2-4 and 2-5/20 to 2-7/3 reflects the following regarding Exhibit 11 (the January 10, 1997 letter):

EXHIBIT LIST

No.	Description	Offered	Received
...			
Plaintiff			
11 -	Complaint letter from Albrechtsen to Greenhill 1/10/97	--	7
...			

THE COURT: Okay. Mr. Lasker, those matters you wish to take up before the jury joins us.
MR. LASKER: I would like to receive clarification, Your Honor, that Exhibit 11 is being received. Or if it is not being received I'm going to need to make reference to it to some witnesses for the defendant.
THE COURT: All right. Let's look at Exhibit 11.
MR. LASKER: That is the January 10, 1997 letter of complaint that Steve Albrechtsen filed with the chancellor.
THE COURT: Response.
MR. MORIARTY: The only purpose for which this exhibit, we have reserved a hearsay. The only reason for which this exhibit should be admitted is whether or not and to what extent it alleges gender discrimination in the complaint itself. And we have no objection to it being admitted for that purpose.
THE COURT: Response.
MR. LASKER: I do think that the significance of it is what he complained about, yes.
THE COURT: Well, neither of you have agreed and so the Court will continue to reserve then.
MR. LASKER: Oh, I thought we were in agreement.

THE COURT: I don't think you do. I listened to the forked tongues that I've been hearing in this trial and I don't think that's an agreement. You said you wanted it for what he has alleged. He wants it in because of the fact that he wants only the gender portion thereof to be brought to the attention of the jury.
MR. MORIARTY: I agree it can be received for the purpose of showing what it was complaining about and not for the truth of the allegations therein.
MR. LASKER: And I agree with that.
THE COURT: All right. Then the Court will receive it for that limited purpose.

(Tr. 2-6/1 to 2-7/3.)

The transcript of the second day of trial at 6/26/01 Tr. 2-20/5-9 reflects cross-examination of Clayton continuing after admission, for limited purposes, of Trial Ex. 11:

THE COURT: And Ms. Clayton has previously been sworn, continues to remain under oath, and we will begin with the further cross-examination of the witness. You may come forward and once again take the witness chair in this matter, Ms. Clayton. And you may proceed, Mr. Lasker.

(6/26/01 Tr. 2-20/5-9.)

The transcript of the second day of trial at 6/26/01 Tr. 2-57/4 to 2-58/6 reflects the following direct examination of Barnett by a Board attorney:

Q [MR. RAMSEY:] Did you take any of the actions you did concerning Steve Albrechtsen's merit pay in 1998 because he's a man?

A [JEFFREY BARNETT:] No.
Q Did you take any of the actions you did concerning Steve Albrechtsen's teaching of these workshops because he is a man?
A No.
Q Teaching of the workshops because he's a man?
A No.
Q Did you take any of the actions you did concerning Steve Albrechtsen's merit pay in 1998 because he had previously complained about being discriminated against because he is a man?
A No.
Q Were you even aware that Steve Albrechtsen had in 1997 complained of sexual harassment?
A I do not remember those kinds of complaints. It is possible that in one of those complaints it was explicitly mentioned. I do know that he complained about individuals. I do know that he complained about being discriminated against. I do know that he complained that other members in the department were disadvantaged because of their association with him. I do not remember in particular that gender was an issue.
Q And finally, did you take any of the actions you did concerning Steve Albrechtsen's merit pay in 1998 because he had previously complained about being discriminated against because he was a man?
A No.

(Tr. 2-57/4 to 2-58/6.)

The transcript of the second day of trial at 6/26/01 Tr. 2-143/4 to 2-145/10 reflects the following direct examination of Greenhill by a Board attorney:

Q Turning to Exhibit 827, a January 26 memo from you to Brenda Clayton involving student evaluations.
A Yes.
Q What were you seeking to convey to Brenda Clayton through that memo?
A Well, I really had two purposes in, well, to restate very clearly the institutional policy and I had, prior to that date there had been correspondence both from Dr. Albrechtsen and Dr. Clayton about the question of student evaluations. So I sought in this memo to make as clear as I could just what institutional policy was regarding student evaluations so that there would be no misunderstanding about that.
Q And how did you -- what did you understand you were conveying -- withdraw the question. What did you understand to be that policy and procedure and requirements at that time?
A Well, the, the, as I stated, that faculty members do not collect the evaluations themselves. They have a student deliver it to the department secretary's office and that it's tabulated there and returned after tabulation and the completion. And also stated that the Board of Regents requires student evaluations for salary increases and promotions.
Q All right. And what was your purpose in conveying in that memo that based on failure of policy no increases have been given in past times. What was your purpose in conveying that?
A Well, I was, I was to, to indicate to the, what the policy was and to indicate to the department clearly that if one was not in compliance with this that there was an option for the department to, to report that and certify that this hadn't been done. And then obviously the consequences of that was no salary increase.

Q None at all?
A None at all.
Q Exhibit 827, there's a blind copy to Steven Albrechtsen.
A Right.
Q Why did -- what does it mean to send a blind copy and why did you do that in the course of being a chancellor as a general matter?
A As a general matter you do it mainly to help and facilitate communications. That is to say somebody may not be the, you may think that you shouldn't directly address it to them, but you could, by sending it out you can make more people aware of what it is. So it had a communications value. And secondarily, or maybe, maybe it isn't secondarily. Certainly a second reason, given the fact that Dr. Albrechtsen and Dr. Clayton had been engaging in a correspondence about student evaluations, Dr. Albrechtsen objecting to the way that it's being handled in the department, this gave him an opportunity to tell me why he disagreed, which he never did.
Q Why did you send a blind copy, what was your purpose at the time in sending a blind copy to Steven Albrechtsen?
A As indicated to both facilitate the communication and to make it clear to him as well as Dr. Clayton precisely what the requirements, and the rules were and, as I said, to invite if he wanted to, to communicate and tell me why he disagreed. But to make clear just what rules pertained to student evaluations.

(6/26/01 Tr. 2-143/4 to 2-145/10.)

The transcript of the second day of trial at 6/26/01 Tr. 2-156/10 to 2-158/12 reflects the following direct examination of Greenhill by a Board attorney:

> Q [MR. MORIARTY:] And in that Exhibit, it's Exhibit 836 in front of you that you're looking at, the March 17th [1998] memo.
> A [H. GAYLON GREENHILL:] That's correct.
> Q What did you believe you were designating through that memo as the first step and who was to take it?
> A Well, the first step would be for Dr- Albrechtsen to turn in his resume because unless we had his resume, the, whatever team we would constitute would not have any basis to look at. And then to get suggestions from, about possible people qualified to make this assessment. And so the first step was for Dr. Albrechtsen to provide his current updated resume.
> Q Now was Steven Albrechtsen a recipient of that memo or was he not a recipient?
> A He was a recipient of it. It was directed to the provost, the dean, Dr. Clayton and Dr. Albrechtsen.
> Q What were your expectations when you sent this memo regarding what might be, what might happen next? What would be actually going to occur?
> A I expected that I'd see a resume from Dr. Albrechtsen the next day.
> Q Okay.
> A I mean I would respond very quickly if I got that.
> Q Had a resume been provided promptly to what extent did you anticipate any problems in those workshops being taught during the summer session of 1998?

A Had that been done promptly we would have constituted a team promptly and I would see that there'd have been no, no hurdles or obstacles, assuming the assessment was that it was within mission and that we had the capabilities of delivering it.

Q Thank you. In your, in the actions you took regarding the merit pay -- let me withdraw the question. In the actions you took regarding both merit pay and the workshops, what, if any, consideration did you give to whether Steven Albrechtsen had or had not previously complained about discrimination based on sex?

A None. No --

Q Why can you say that?

A Because it never came into consideration on those. Those were different issues and only addressed the issues at hand.

Q Okay. To what extent, if at all, were you aware, prior to March of 1998, whether Steven Albrechtsen had ever complained about discrimination based on sex?

A I don't think I was aware, but I, I can't be absolutely certain about that issue. I don't know. That to me seems to be a recent issue, but --

Q In your actions regarding the workshops and the merit pay, what, if any, consideration did you give to whether Steven Albrechtsen was a male?

A None.

Q And why can you say that?

A Because that didn't have any bearing on that issue either, whether he was male or female.

(Tr. 2-156/10 to 2-158/12.)

The transcript of the second day of trial at 2-176/25 to 2-177/24 reflects the following cross-examination of Greenhill by Petitioner's attorney:

> Q Okay. Would you refer your attention now all the way down to Exhibit 836, which is the March 17, 1998 memo from you to others regarding the workshops that were being taught by Dr. Albrechtsen. Can you point to me anywhere in this document where you made a request to Dr. Albrechtsen that he provide you with a resume?
> A It is clear that when one says that you have to have an updated resume that the person himself or herself prepares it. Nobody else can prepare or should be expected to prepare a resume for a person. They don't know. So whether my language was as clear as it should have been, anybody reading it would be clear that Dr. Albrechtsen should prepare his resume so it would be ready for the assessment.
> Q So is it a fair statement based upon this document as you're looking at it today, and you're the author of it, that you intended to convey to Dr. Albrechtsen that he should promptly provide an updated resume, but you did not state that request clearly as a request like that?
> A I clearly would, expected him to do that. Whether I could have stated it more clearly is of course a question.
> Q Isn't it common knowledge among faculty members that their resumes are on file with the department chair?
> A I wish that were case. No all the resumes are, and certainly not up to date resumes. That's, that's -- would be desirable, but that's not the case.

The transcript of the second day of trial at 6/26/01 Tr. 2-180/20 to 182/8 reflects Petitioner's attorney concluding his cross-examination of Greenhill in this way:

> Q [MR. LASKER:] You testified on direct examination, Dr. Greenhill, that sex discrimination was a recent issue. What did you mean by that?
> A [H. GAYLON GREENHILL:] It was recent in the sense of it being raised by Dr. Albrechtsen. I mean the question of sex discrimination in America is, is, been around. But --
> Q So what do you mean by your asserting that Dr. Albrechtsen's allegation of sex discrimination was recently made?
> A That it isn't that -- it was late in this long litany of stuff that, of complaints and such that I recall any kind of reference to sex discrimination. It may have been raised by other -- to other people, but I, not to me.
> Q Well, you were assistant or vice chancellor in 1989, were you not?
> A That's what I was, yes.
> Q When Chancellor Connor first received a written complaint about sex discrimination from Dr. Albrechtsen?
> MR. MORIARTY: Relevance, Your Honor.
> THE COURT: Sustained.
> BY MR. LASKER:
> Q You were the chancellor of the University in 1993 when you entered into an agreement with Dr. Albrechtsen to resolve some issues about his being unfairly treated by the female majority of the tenured faculty, correct?
> MR. MORIARTY: Objection. Relevance and argument.
> THE COURT: Sustained.

BY MR. LASKER:
Q Well, did you read the letter of January 10, 1997 when he presented that to you, Exhibit 11?
A Which -- No. 11?
Q I beg your pardon. I don't think it's in front of you any more, but it's the letter.
A Number 11?
Q It's the letter from Dr. Albrechtsen of six single spaced typewritten pages that you received.
A Oh, oh, oh. Yeah, this one. That -- I did indicate to you that I read that at that time.
MR. LASKER: Nothing further.

The transcript of the second day of trial at 6/26/01 Tr. 2-185/22 to 2-187/13 reflects Petitioner's attorney concluding his re-cross-examination of Greenhill in this way:

BY MR. LASKER:
Q Do you remember when Dr. Albrechtsen wrote to you warning you that the [January 10, 1997] complaint would effectively expire as of April 10th of 1997?
A I remember I received a letter from him about the timing of the complaint.
Q And the report that you just referred to that's referred to in Exhibit 83 was issued after the 90-day period had expired, isn't that correct?
A It -- and I mis-- on the report I misspoke. That, I received the report, the report is dated April 24. If, my letter of April 25th was when I notified Dr. Albrechtsen of the result of the, of the report. But the, the handling of this matter, as there was no actions, discipline necessary, when there were none of these violations occurred, made that a moot question. We had the issue resolved about the complaint.

Q Your letter to Dr. Albrechtsen telling him your conclusion in the matter was written 15 days after the complaint effectively expired, isn't that correct?
A In the specific April 10. But I received the report on the 24th and approved it.
Q And it, and the complaint expired under University rules on April 10th, correct?
A It could have expired.
Q Let me show you an exhibit to refresh your recollection.
MR. MORIARTY: Relevance, Your Honor.
THE COURT: Overruled. There's no question before the witness.
BY MR. LASKER:
Q Showing you Exhibit 79 and ask you if that refreshes your recollection when it expired? Can you say yes or no?
A I, I received this letter. I didn't go back and check the dates to see if he'd calculated the dates correctly. I waited for the report and I answered it at that point.
Q So it doesn't refresh your recollection as to when it expired?
A I have indicated that I received that letter there and what I said was he calculated the April 10th. I didn't calculate to see if those were the 90 days.
MR. LASKER: Nothing further.
MR. MORIARTY: Nothing further.

(Tr. 2-185/22 to 2-187/13.)

The transcript of the second day of trial at 6/26/01 Tr. 2-211/15 to 2-213/9 reflects the following comments by Petitioner's attorney during his closing argument to the jury:

[MR. LASKER:] And so [Petitioner] asserted his individuality, which was an unusual thing in the

department. And in, as time went on he complained at various times about being unfairly treated and, as a man, and by the time of, by January of 1997 Dr. Albrechtsen was complaining specifically, in Exhibit 11, to Dr. Greenhill about being unfairly treated in matters of his participation in the activities of the department as a man and also being subjected to the experience of having friends and associates of him in the department, people that had become professional friends of his and associates of his, getting unfairly treated also. Most particularly Dr. Hedrich and Dr. Barak and the other two women whose names I can remember, Sandusky and Krattiger-Ziltener just came to me. Again, I remembered I guess.

Those four people who happened to be heterosexual women, were also being treated unfairly, he complained and he believes exclusively because of their association with him, so that they're getting the adverse effects of the unlawful gender-based discrimination and retaliation as well as he is. And he is getting retaliated against indirectly and discriminated against indirectly because it pains him to see people being unfairly treated simply because they have become professional colleagues of his.

Well, by late 1997, after Chancellor Greenhill indeed did let this complaint expire, and ignored this complaint which was not even a new complaint to him, Dr. Clayton saw an opportunity to treat Dr. Albrechtsen unfairly. And I believe that you have seen ample evidence in here that she was, had her antenna up for opportunities to treat Dr. Albrechtsen unfairly. And I have to make an important aside to you about the evidence. But

> you've heard the phrase what goes around comes around? And on the witness stand Dr. Clayton was complaining quite bitterly about how unfairly treated she's been –how she's been unfairly treated by Dr. Albrechtsen, even though that's not the issue and that's not what's before you on trial.
> But I submit to you that she feels like she's had such a hard time and believes that she's had a hard time because she has run up against somebody who has not been willing to do it her way and who has not been willing to be treated unfairly by her. And I believe that it is a most reasonable inference for you to make, that a motivating factor in her unfairness to Dr. Albrechtsen is his male gender. And then ultimately and long ago also became a retaliatory motive to retaliate against him at every opportunity.

(6/26/01 Tr. 2-211/15 to 2-213/9.)

The transcript of the second day of trial at 6/26/01 Tr. 2-225/6 to 2-226/4 and 2-234/4 to 2-235/8 reflects the following comments by a Board attorney during its closing argument:

> [MR. MORIARTY:] One quick point on the discrimination on a prior complaint. We're going to take a look, or you will take a look at this January 10th, 1997 memo that everyone's been talking about. You read through that. January 10th, 1997 memo, letter, six-page, single-spaced letter as everyone has said. Read through that and see if you see allegations of discrimination based on gender or sex, reference to male/female. I was discriminated against because I was a male. They did this because they were female. You look through that complaint and see if you see it. The witnesses weren't able to see it.

Certainly if it's in there if it can possibly be read and parsed out in some way that if you put these words on top of another you can read it that way. Maybe somebody can read it that way. Maybe you, if you really try hard might be able to read it in there. But the question is, these folks that got this letter, did they understand it to be a complaint of gender discrimination? No. None of them did. They understood it to be a complaint about a lot of other things, and it certainly is, but not gender discrimination.

And unless you find that he proved to you that they even knew this was a complaint of gender discrimination how could they have retaliated based on a complaint of gender discrimination. That's the first step.

...

Let's go through those [verdict questions] once again. Was plaintiff Steven J. Albrechtsen denied the opportunity to teach two summer workshops by the board because of intentional discrimination on the basis of his gender? Your answer to that must be no. Where's the connection? Where's the connection? Where's discrimination?

Was he denied the opportunity to teach two summer workshops in retaliation for complaining about gender discrimination? Well, the main players didn't even know about it. When he complained about gender discrimination? I don't know. Maybe it's in there somewhere. But he complained about so many things it's hard to tell. That's the problem number one. Problem number two is this January 1997, if it occurred, January 1997, 14 months later is when we have these issues arising. If you're going to retaliate

> because someone's complained against you, you normally see it pretty quick after the complaint is made, not 14 months later.
> Was Steven Albrechtsen denied a higher merit increase in 1998 by the board because of his gender, because of intentional discrimination based on his gender? No. He didn't do the student evaluations. That's why what happened happened. And so the answer to that must also be no.
> Finally, was Plaintiff Albrechtsen denied a higher merit pay increase in retaliation for complaining about gender discrimination? We've got that same problem, no knowledge of a gender discrimination complaint. Even if they had knowledge it's 14 months ago. And besides, we're talking about Brenda Clayton having been far more generous, far more generous than she was entitled to be and instead she gets subjected to what has happened here.

(6/26/01 Tr. 2-225/6 to 2-226/4 and 2-234/4 to 2-235/8.)

The transcript of the second day of trial at 6/26/01 Tr. 2-239/17-25 reflects the following comments by Petitioner's attorney during his final closing argument:

> [MR. LASKER:] Exhibit 11, which is the January 1997 letter of complaint to Dr. Greenhill, did not occur in a vacuum. And I ask you to read it in the context of all of the evidence and understand that it was written by Dr. Albrechtsen in the context of all of the other evidence and it was read by the other people who, was read by Dr. Greenhill and the others to whom it is, was copied certainly in the same context of the well-known complaints that Dr.

Albrechtsen had registered at that point against Dr. Clayton.

(6/26/01 Tr. 2-239/17-25.)

The text of the jury verdict on liability, reflecting the handwritten answers by the jury, states:

1. Was plaintiff Steven J. Albrechtsen denied the opportunity to teach two summer workshops by the defendant Board of Regents of the University of Wisconsin System because of intentional discrimination against him on the basis of his gender?

ANSWER: No
(Yes or No)

2. Was plaintiff Steven J. Albrechtsen denied the opportunity to teach two summer workshops by the defendant Board of Regents of the University of Wisconsin System in retaliation for complaining about gender discrimination?

ANSWER: Yes
(Yes or No)

3. Was plaintiff Steven J. Albrechtsen denied a higher merit increase in 1998 by the defendant Board of Regents of the University of Wisconsin System because of intentional discrimination against him on the basis of his gender?

ANSWER: No
(Yes or No)

4. Was plaintiff Steven J. Albrechtsen denied a higher merit increase in 1998 by the defendant Board of Regents of the, University of Wisconsin System in retaliation for complaining about gender discrimination?

ANSWER: Yes

(Yes or No)

(Dkt. 82 (6/26/01 Special Verdict-Liability).)

The Board's district court brief supporting its post-trial motions stated, at pages 13 and 35-38:

> No presumed nexus due to time gap between protected activity and materially adverse action: [Citation omitted] affirmed a Rule 50 judgment on a Title VII retaliation claim after an adverse verdict because the protected activity occurred "thirteen months" before the challenged employment actions. [Citation omitted.]. *See also* [citation omitted] (citing Seventh Circuit decisions that found four months and six months to be "insufficient" to create any presumption of nexus). Indeed, a "substantial time lapse between the two events is counter-evidence of any causal connection." [Citation omitted.] Although the protected activity in [citation omitted] was, unlike here, a formal EEOC charge, the "thirteen month" time gap between that charge and the challenged action was, as a matter of law, not "a close enough temporal link to infer a causal nexus." [Citation omitted.] As a result, the lack of sufficient record evidence affirmatively establishing a causal nexus – standing alone - justified a Rule 50 judgment for the defendant on the retaliation claim. [Citation omitted.]
>
> ...
>
> 1. It is unrebutted that Greenhill, Barnett and Clayton either did not know, or did not recall knowing, that Albrechtsen had previously complained about sex discrimination.

Greenhill, Barnett and Clayton each confirmed that, in 1998, they either did not know, or did not recall knowing, that Albrechtsen had previously complained about sex discrimination. (6/25/01 Tr. 1-265/9-14; 6/26/01 Tr. 2-57/17 to 2-58/6; 6/26/01 Tr. 2-157/15 to 2-158/5, 180/20 to 181/7.) That testimony stands unrebutted in the record.

Albrechtsen, at trial, could have tested that testimony. He could, for example, have shown Greenhill, Barnett and Clayton the January 10, 1997 letter and, without asking them to merely read from that received exhibit, have inquired what they understood specific statements meant when they reviewed it in 1997 – even asking them leading questions about whether they understood those specific statements to be complaining about sex discrimination.

He left untouched the clear testimony of Greenhill, Barnett and Clayton that they did not know, or recall knowing, of any prior complaint of sex discrimination. Their testimony was supported by the contents of the January 10,.1997 letter – which contains no assertion of sex discrimination. (Trial Ex. 11. *See* pp. 22-25 *supra*.) Indeed, Albrechtsen's attorney could not help but read the letter as alleging unfair treatment rather than discrimination. (6/26/01 Tr. 2-164/18 to 2-165/11 and 2-166/23 to 2-167/3.) (*Compare* 6/25/01 Tr. 136/4-10 (Albrechtsen testifying that, in a 1989 complaint, he "worded it as bias against males in [his] department").)

Beyond plaintiff engaging in a protected activity, the person responsible for any alleged materially adverse employment action must, at a minimum, actually have knowledge of prior protected activity. [Citations omitted] ("The critical issue here, however, is whether the person who made the

decision to terminate his employment was aware of the discrimination allegations at the time, because absent such knowledge Maarouf lacks a causal link between the termination and the complaint of discrimination. [Citation omitted in original brief.]") [Citation omitted.] ("If an employer is unaware of the protected activity, it is self-evident that a causal connection with the materially adverse action cannot be established. [Citations omitted in original brief.]") There was insufficient evidence that the three persons to whom Albrechtsen attributes retaliatory conduct knew of any prior protected activity. Since there was no prior protected activity (pp. 22-29 *supra*), this failure of proof is understandable. But, even if there were sufficient evidence of a protected activity, the causation element remained unproved absent evidence that the alleged retaliators knew of that protected activity. [Citation omitted.] When there is a failure of proof on the causation element, the district court need look no further before granting a Rule 50 judgment. [Citation omitted.]

2. Time gap between January 10, 1997 letter and challenged actions without other evidence establishing any nexus.

Albrechtsen apparently relied on the mere fact that the January 10, 1997 letter preceded the challenged actions in 1998 to establish a nexus. He certainly made no effort to otherwise prove there was any nexus between the letter and the 1998 events that he challenged. If he assumed that a presumption of retaliation applied, simply because the 1997 letter preceded the 1998 events, he was badly mistaken. *Payne* affirmed a Rule 50 judgment for defendant, after an adverse verdict on a Title VII retaliation claim, because the protected activity occurred "thirteen months" before the challenged employment

actions. [Citation omitted.] The protected activity that the plaintiff in [Citation omitted] focused on was a formal EEOC charge - unlike Albrechtsen's internal letter that was far from clearly identifiable as a document opposing Title VII activities. *Compare* [citation omitted] with Trial Ex. 11. Nonetheless, the "thirteen month" time gap between that charge and the challenged action, as a matter of law, was not "a close enough temporal link to infer a causal nexus." [Citation omitted.] As a result, absent affirmative record evidence that established a causal nexus, Rule 50 judgment was proper. [Citation omitted.]

The Seventh Circuit recently confirmed again that a thirteen month gap is far too great to presume any nexus - even when both a protected activity and materially adverse employment actions are assumed to be present:

> For the purposes of summary judgment, we will assume that Dombrowski has met the first two requirements of the prima facie case. The district court found, however, that Dombrowski's retaliation claim failed at the third prong because she could not show a causal connection between her complaint of sex discrimination and either of the adverse job actions because of the thirteen month period between the protected expression and the adverse action. Dombrowski complained of sex discrimination in June of 1996, yet she was not transferred or denied the promotion to assistant general manager until October of 1997. We agree with the district court. "In order to establish a causal connection via mere temporal proximity, the employer's adverse action must follow fairly soon after

> the employee's protected conduct." [Citation omitted.]

[Citation omitted.]

With one exception, Albrechtsen attributed the challenged actions regarding the merit pay increase and workshops to an internal letter dated at least thirteen months before any of those challenged actions. (Trial Exs. 11 (January 10, 1997 Albrechtsen letter), 824 (January 12, 1998 Clayton memo raising student evaluation issue), 838 (March 4, 1998 Clayton memo raising concerns over workshops), 836 (March 17, 1998 Greenhill memo regarding workshops), 818 (March 18, 1998 Barnett memo regarding merit pay). The exception was the memo which first raised the student evaluation issue twelve months after January 10, 1997. (Trial Exs. 11 and 824.)

Noting this exception does not save Albrechtsen's claims. Clayton's January 12, 1998 memo was plainly not a materially adverse employment action. The retaliation regarding merit pay was instead alleged to have occurred in March 1998, fourteen months after January 10, 1997, when the faculty rated Albrechtsen and the other persons in his pool for merit pay and when the merit pay increase decisions were finalized by Barnett. (Trial Ex. 818; 6/25/01 Tr. 1-160/6-20; 6/25/01 Tr. 1-283/9 to 1-284/7; 6/26/01 Tr. 2-48/9 to 2-53/12; 6/26/01 Tr. 2-56/19 to 2-57/3 (Clayton affected merit pay increases in 1998 only through the ratings she gave as a faculty member).) Regardless, January 12, 1998 was more than twelve months after January 10, 1997 and that was far too great a gap, as a matter of law, to presume any nexus:

> In order to establish a causal connection via mere temporal proximity, the employer's

> adverse action must follow fairly soon after the employee's protected conduct. [Citation omitted.] In the absence of any other evidence of a causal link, the 18-month interval in this case is insufficient proof of causation. *See* [Citation omitted] (4 months insufficient); [Citation omitted] (6 months insufficient). Because Fyfe cannot establish a prima facie case of Title VII retaliation, we need go no further.
>
> [Citation omitted.] Indeed, a "substantial time lapse between the two events is counter-evidence of any causal connection." [Citation omitted.] *See also* [Citation omitted] (questioning, under circumstances, whether presumption appropriate as to two week gap).
>
> Absent any presumption of a nexus, proof of causation failed, as a matter of law, without affirmative evidence that a nexus existed. [Citations omitted.] Albrechtsen presented no such affirmative evidence. Without sufficient evidence to affirmatively establish a nexus, judgment may be granted, as a matter of law, on both of the retaliation claims. [Citation omitted.]

(Dkt. 102 (8/3/01 Board brief, pp. 13 and 35-38), citations omitted to assure compliance with S.Ct.R. 15.3 and 24.3.)

Petitioner's district court brief opposing the Board's post-trial motions stated, at page 4:

> Another case which is not pertinent but which defendant, again, tries to shoehorn into the facts of the instant action is [Citation omitted.] Defendant cites [citation omitted] to argue that there was an inadequate causal link between the protected activity and the adverse employment action. *See* defendant's

> brief at 13. In [Citation omitted], the plaintiff had "not provided evidence that would suggest, let alone establish, a nexus between his discharge and the filing of the EEOC complaint." [Citation omitted.] The court held that the time lapse from when the EEOC complaint was filed and Payne's discharge, which was over 13 months, "*alone* is not enough temporal link to infer a causal nexus." Id. (emphasis added). In [citation omitted], there was *no* evidence that the his discharge was retaliatory other than "Payne's subjective belief." Id. The facts in [citation omitted] bear no resemblance to the instant action.

(Dkt. 107 (8/24/01 Albrechtsen brief, p. 4), citations omitted to assure compliance with S.Ct.R. 15.3 and 24.3.)

The Board's district court reply brief supporting its post-trial motions stated, at pages 11-12:

> [Petitioner] asserts that [citation omitted], in holding that a time gap of 13 months between acknowledged protected activity and an adverse employment action precluded any presumption of causation ([citation omitted]), was "not pertinent" and one which the Board improperly tried to "shoehorn" into the analysis. (8/24/01 Albrechtsen brief, p. 4.) Why? Because, in [citation omitted], "there was *no* evidence that his discharge was retaliatory other than 'Payne's subjective belief' [citation omitted]" and, Albrechtsen asserts without explanation, the "facts in [citation omitted] bear no resemblance to the instant action." (8/24/01 Albrechtsen brief, p. 4, italics in original.) His effort to distinguish this holding in [citation omitted] fell woefully short. (*See* pp. 8-9 *supra*.) To the contrary, [citation omitted] confirmed the pertinent point that where no presumption of causation applied to Title VII retaliation claims, a

Rule 50 judgment is appropriate absent adequate affirmative evidence of "but for" causation. (*See* 8/3/01 Board brief, pp. 13, 14, 35-38, 41 (citations to [citation omitted].) [Citation omitted], combined with the Board's other citations, which Albrechtsen did not mention, also confirmed that a time gap of even four months precludes a presumption of causation. (*See* 8/3/01 Board brief, pp. 13, 14, 35-38, 41.) [Citation omitted] (citing Seventh Circuit decisions that found four months and six months to be "insufficient" to create any presumption of nexus).[3]

> [3]As a separate matter, on August 27, 2001, in an appeal filed by Albrechtsen's attorney on behalf of a different client, [citation omitted] held that no presumption arises even when the time gap is just one day between protected activity and employment action absent evidence that the actors knew about the protected activity. [Citation omitted.]. Albrechtsen has now conceded, by silence, that that neither Clayton, Barnett nor Greenhill had knowledge, when they acted in 1998, that Albrechtsen had complained about sex discrimination through his January 10, 1997 letter. (8/3/01 Board brief, pp. 34-35 citing 6/25/01 Tr. 1-265/9-14; 6/26/01 Tr. 2-57/17 to 2-58/6; 6/26/01 Tr. 2-157/15 to 2-158/5, 180/20 to 181/7.)

(Dkt. 108 (8/31/01 Board reply brief, pp. 11-12), citations omitted to assure compliance with S.Ct.R. 15.3 and 24.3.)

The district court order entered September 7, 2001 that denied the Board's post-trial motions stated, in part, that:

> On June 1, 2001 the Court denied defendant's motion for summary judgment on plaintiff's gender discrimination and retaliation claims concerning the denial of a merit increase and teaching opportunities in 1998. The Court considered events occurring between November 1, 1997 and September 5, 1998 based on the filing dates of his EEOC complaints. The Court did, however, consider plaintiff's January 10, 1997 letter which was outside the time period as evidence of defendant's knowledge that plaintiff opposed gender discrimination.
> Prior to trial defendant moved to exclude this letter. The Court allowed the admission of the letter as evidence of defendant's knowledge.
> At trial evidence was admitted that plaintiff had opposed gender discrimination and that after he did so he was denied a merit increase and the opportunity to teach two summer workshops. Evidence was also submitted that retaliation was a motivating factor for defendant's decision.
> ...
> Although irrelevant evidence was frequently offered by plaintiff at trial, nonetheless where objections were made they were sustained. Further, evidence was admitted that plaintiff engaged in protected expression by opposing gender discrimination and that he was subjected to adverse employment actions by the defendants when he was denied the opportunity to teach two summer courses and a higher merit increase in 1998. From this a jury could reasonably conclude that retaliation was a motivating factor in defendant's decisions concerning plaintiff.

Accordingly, defendant's motion for judgment as a matter of law will be denied.

...

Defendant [in seeking a new trial based on evidentiary error] contends that the Court erred in allowing plaintiff to attribute retaliation to the January 10, 1997 letter rather than the events before 1991 expressly articulated in his EEOC charge. The letter was properly admitted to show defendant's knowledge that plaintiff had opposed gender discrimination.

Defendant contends that this letter does not oppose gender discrimination. The Court disagrees. The letter written by plaintiff to H. Gaylon Greenhill, the Chancellor of UWW, states, "These members of the tenured faculty have repeatedly violated the rights of individuals, acted without regard for law and procedure and perpetuated an extremely hostile environment in the Williams Center." This statement in conjunction with plaintiff's past complaints provided notice to defendant that plaintiff opposed gender discrimination. Sufficient evidence was admitted in addition to the letter from which the jury could have concluded that defendant knew plaintiff opposed gender discrimination. Defendant's motion for a new trial on liability on this ground will be denied.

(Dkt 109 (9/7/01 Memorandum and Order, pp. 3-5).)